

THOMAS AMBRO
WEDNESDAY, NOVEMBER 10, 1999
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:31 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Biden, Feinstein, and Schumer.

OPENING STATEMENT OF HON. ORRIN G. HATCH A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. We are happy to welcome everybody here. Today, the committee is holding its seventh nominations hearing for this session of the 106th Congress. We will hear from 5 judicial nominees, 2 circuit court nominees and 3 district court nominees.

We have two panels today. The first panel will consist of the sponsors of the nominees, who will give brief statements on behalf of their nominees. And we are happy to welcome all of these distinguished sponsors here today. The second panel will consist of the nominees themselves.

Before we turn to the panels, I believe Senator Feinstein is going to come. She met me going into the Senate floor and said she would be a little bit late, and we will recognize her as soon as she comes to make a statement on behalf of the minority.

Now, I am happy to welcome the sponsors here today, the distinguished gentlemen at the table.

As I understand it, Senator Moynihan, you have been here a long time and you need to leave.

Senator MOYNIHAN. Well, sir if I may, I would like to defer to my revered colleague and your friend, Mr. Rangel.

Chairman HATCH. Could I ask a favor of you? Senator Smith needs-

Senator MOYNIHAN. I do not have to leave, sir. I defer to my friend.

Chairman HATCH. Could we let him give his opening statement and accommodate him, and then I will turn to you, Senator Moynihan?

And, Charlie Rangel, I am going to turn to you. If you are going to be my Vice President, I want to recognize you right off the bat.

[Laughter.]

Mr. RANGEL. That makes a lot of sense to me, Mr. Chairman.

Chairman HATCH. It makes a lot of sense to me, too.

Senator Biden has graciously agreed to proceed with the sponsors, so let's turn to you-

Senator BIDEN. Mr. Chairman, only because I thought that Senator Smith was introducing Congressman Rangel as a nominee for

the court. I thought that is why he was here.

Chairman HATCH. He would want to be on the Supreme Court. I know him real well.

Senator MOYNIHAN. He is here as a candidate for the vice presidency on an important ticket that may yet evolve in the mists of

New Hampshire.

Chairman HATCH. That is right.

Senator BIDEN. Sign me on.

Chairman HATCH. I have agreed to take him as Vice President, but that is only if Senator Moynihan and Charlie really help me to get above 1 percent in the polls.

[Laughter.]

But don't worry. People are starting to realize that I am in the race.

Senator BIDEN. In my experience, that is when it gets dangerous.

Chairman HATCH. That is right.

Senator Biden, we will turn to you.

STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR
FROM THE STATE OF DELAWARE

Senator BIDEN. Mr. Chairman, I would like to introduce the nominee for the third circuit from Delaware, Tom Ambro. But before I do, I would like you to meet the only reason why Senator

Roth and I support him, Mary Lou Ambro.

Mary Lou, would you stand up?

[Ms. Ambro stood.]

Mary Lou is the real brains of the outfit, and that is the only reason I am supporting him. I am not sure why Roth is, but that is the only reason I am.

I would like to mention that they have three beautiful children.

One is a medical doctor and is in his residency, Brian, and Sarah and Andrea are the lights of his life. But at least there is one child who will probably be able to make enough money to compensate the inability that he is going to be able to have when they put him in the home after he retires. You will get a room with a view because you are about to enter into an area that you haven't been for a while.

I would like to read, if I may, a very brief statement from Senator Roth, who is a strong, strong supporter of Tom. The reason he

is not here today is he is literally doing double duty in Delaware.

We are trying to deal with the C-5A's at Dover Air Force Base, and

I left a meeting early that he is chairing with the members of the Joint Chiefs of Staff to deal with our requirements at Dover Air Force Base. And he apologizes.

He says,

"It is my pleasure to speak on behalf of the nomination of Thomas Ambro to the U.S. Court of Appeals for the Third Circuit. Tom Ambro served on my Washington staff while attending Georgetown Law School. Following a clerkship with Delaware Supreme Court Justice Daniel Hermann, Tom distinguished himself as a corporate law attorney with the law firm of Richards, Layton and Finger in Wilmington. I should point out that my wife, Jane Richards Roth, had the pleasure of working with Tom before her own appointment by President Bush to the Third Circuit Court of Appeals.

As Senator Biden can attest, the small size of our State fosters the growth of personal and professional relationships in a way uncommon elsewhere, especially among our legal community. From the very beginning of his career, I have observed Tom's rapid development into one of the most superb legal minds in Delaware.

I have no doubt that Tom will be an outstanding judge on the Third Circuit Appeals Court. He is an excellent nomination and I urge all of my colleagues to support him."

Mr. Chairman, if I may say a few words of my own relative to Tom, Tom is one of the most respected members of the Delaware bar. He is not only respected for his legal acumen, he is respected for his integrity and the degree to which he has involved himself

in pro bono work and good causes in the State of Delaware.

I might also add he is recognized nationally as a legal expert and scholar in business law and bankruptcy law, and you can see from the questionnaire he has been published numerous times. With his first-rate legal mind and a judicial temperament to match, as I know you and our predecessor Senator Thurmond always ask-you want to focus on the temperament of a Federal judge because Federal judges, once they put on the robes, it is the last we usually

hear from them. They are there for life, and not all maintain the temperament that is required to serve the people, and that is what they are there to do, to serve the people of this country. They are the employees of the people of this country, just as we are, and many forget it, in my view. But Tom's temperament, I think, is uniquely suited as a judicial temperament. He is fair to all people, and he is considerate to all people.

I have a little test in my own mind that I apply when I am with someone who has succeeded in an area, whether it is an athlete or whether it is an attorney or a medical profession person or anyone else. I watch, when we go to lunch, how they treat the waitresses and waiters. If somebody who works with me or anyone I am sitting with goes like that [snapping fingers] for a waiter or waitress,

I assure you that is the end of their stay with me.

Tom Ambro is considerate to everyone, and I am convinced that he will continue that kind of courtesy to the lawyers who appear before him in the third circuit. I am proud to say that I have known Tom since his early days as a young attorney working with the Delaware senior Senator and my friend, Bill Roth, in the mid-1970's.

Tom also, as has been mentioned, served as a clerk for the supreme court of our State, and has joined one of the most prestigious law firms in our State, and one of the oldest law firms. In the past several years, Tom has been recognized as one of the "Best Lawyers in America." But community service has always been Tom's calling. He serves on the board of the West End Neighborhood House, in the city of Wilmington, which is primarily disadvantaged, low-income minorities. He also serves on the World Affairs Council of Wilmington.

He has been tapped for numerous other national, judicial and State boards, including several American Bar Association committees, the Supreme Court Historical Society, the Third Circuit Judicial Council Committee on Bench and Bar Relations. He is a member of Phi Beta Kappa, and graduated magna cum laude from

Georgetown University, where he received his bachelors of arts degree in history and received his law degree from Georgetown University School of Law in 1975.

He will probably not like my telling this, but when Tom and I met, I was amazed, as everyone else was, that he is so modest that he had any interest in the court at all. I had recommended, and Bill Roth had recommended other people, never knowing that Tom had any remote interest in being on the bench.

He devotes an inordinate amount of time to his alma mater, Georgetown, and gives very generously to Georgetown, having come from very modest means himself in Ohio. He tells the story about how he got on the bus, never even having been to Georgetown, with a scholarship and headed off to Georgetown University, and got off as a wide-eyed kid from Ohio in the middle of Washington, DC, and started off the first semester and moved along and found out he didn't have enough money, notwithstanding the scholarship, to be able to eat all his meals.

And he went to a particular priest at Georgetown and indicated his dilemma, and Georgetown "took care of him" and took care of it. And Tom has felt obliged since then, and committed to endowing a chair at Georgetown, as well as being the guy who is the chief admissions interviewer for our region. And it is amazing to watch the amount of time he, and I must say Mary Lou, who is a Georgetown girl herself-the amazing amount of time they spend.

Actually, you were where?

Mr. AMBRO. Trinity.

Senator BIDEN. Trinity, which Georgetown thought was part of them, and back in those days wished it were.

[Laughter.]

But at any rate, it is amazing the amount of time, if you watch him with these young kids who are applying to Georgetown, and the amount of time and effort and guidance he gives them, whether or not they get into Georgetown, and how he helps them.

Tom is a friend and a superior attorney, and I have no doubt that he has the brains, the temperament, the background, and the ability to be one of the finest third circuit judges that we have had, and we have some very, very, very fine ones on the third circuit, as all circuits have.

So, Mr. Chairman, let me end by thanking you. You have been a personal friend. I had your seat for a number of years and I know when we get down to this period in the legislative calendar, each of our parties suggest we should not be so anxious as chairs to promote the hearings and/or the confirmation of judges appointed by a President of the other party.

You have indicated to me and to Senator Roth that you would do all you could to help. It is a bit unusual that he would move as quickly as he has. His background, fortunately for him, has nothing controversial; it is vanilla in terms of any controversy in his background. And his reputation is so stellar that it has gone through-from the time it was recommended, it has gone through the FBI checks, as well as through the Justice Department and White House, extremely quickly.

But I know there is pressure for you not to move on this, and I appreciate the personal courtesy you have extended to Senator Roth and me. There has been a tradition on this committee that members of the committee, particularly people who have formerly chaired the committee, have been granted that courtesy, but it has not always occurred. In this case, I had no reluctance in asking for that courtesy to be extended because I have so much confidence in the capacity and the integrity of the man that I have recommended to you today.

So I thank you, Mr. Chairman, and I appreciate your indulging me to say a few words about Tom.

Chairman HATCH. Thank you, Senator Biden. That is what I call really high praise.

Let's call Thomas Ambro, of Delaware, to be U.S. circuit judge for the third circuit, and Kermit E. Bye, of North Dakota, to be U.S. circuit for the eighth circuit.

If I could swear you all in, would you all raise your right hand? Do you solemnly swear that the testimony you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so

help you God?

Mr. AMBRO. I do.

Chairman HATCH. Thank you. We welcome all of you here, and if we could, maybe we will start with you, Mr. Ambro, if you have any statement. I would like you to introduce any family members or friends that you may have here. Take time to do that, and if you have a short statement, we would be happy to take that at this time as well, and we will just go across the table.

TESTIMONY OF THOMAS L. AMBRO, OF DELAWARE, TO BE U.S. CIRCUIT JUDGE FOR THE THIRD CIRCUIT

Mr. AMBRO. Mr. Chairman, I am just honored to be here and to be considered by this committee. I really have nothing further to say except thank you.

Chairman HATCH. Thank you.

Well, thank you.

Let me start with you, Mr. Ambro. You have had significant experience in large cases involving numerous creditors and debtors,

and in drafting legal opinions on complex business transactions. As

a lawyer from Delaware, you are familiar with the State laws governing business transactions and with the interrelationship between Federal and State law in governing multi-State and bankruptcy transactions.

As you are aware, the Supreme Court has issued several federalism decisions in the past few years that have recognized the

power of State institutions to govern State transactions and activities. In your view, how will the recent federalism decisions of the

Supreme Court of the United States impact the work of the Federal

courts, including the third circuit, and do you view this as a positive development for the legal system?

Mr. AMBRO. Mr. Chairman, I believe that the decisions essentially give deference-or, by implication, give deference to the enactments of the States. In my own particular State, Delaware, especially with its corporate law background, that is particularly significant. So I continue to believe that going into the future that

what you see with regard to State enactments-in my case, the

general corporation law and also the business entity enactments

that Delaware has come out with in the last 10 years--will continue to be used by practitioners. And at this point, I believe that

there will be an even greater deference to those State enactments,

be they Delaware or elsewhere.

Chairman HATCH. Thank you.

I notice that Senator Roth is here, and I am sure he is for you,

Mr. Ambro. So why don't we give you an opportunity, Bill, to make any statement you would care to make?

Senator BIDEN. He is also Chairman HATCH of the Finance Committee, so we usually stand when he walks in.

Chairman HATCH. We are just too tired at the end of this session, and mainly because of what he has been doing.

[Laughter.]

Go ahead.

STATEMENT OF HON. WILLIAM V. ROTH, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator ROTH. Well, I thank you. I understand that Senator

Biden read my statement, but I just wanted to come here to personally endorse the nomination of Tom Ambro. He is an outstanding attorney in the State of Delaware. He is known as one of the corporate law experts, particularly in the area of bankruptcy.

My wife had the pleasure of practicing with him, and I think they

are pretty damn good lawyers. Of course, I wouldn't dare say otherwise. Tom worked for me when he was at Georgetown Law School

for a while, so I know him personally, and I just can't think of a

better nomination.

I congratulate you, Senator Biden, for nominating this outstanding attorney, and I look forward to his early confirmation.

Chairman HATCH. Well, thank you, Senator Roth.

I think it is a tribute to you, Mr. Ambro, that as busy as he is--and I know how busy he is; he is right in the middle of some of

the most important legislation in history, let alone this session.

Mr. AMBRO. Mr. Chairman, I thank the Senator, and I would also like to add with regard to Senator Biden I will do everything I can, no matter what happens, to live up to what you said today, and it could not be more appreciated.

Thank you.

Chairman HATCH. I have a feeling you are going to be able to do that.

Thank you, Senator Roth. We appreciate your coming.

Senator ROTH. Thank you, Mr. Chairman, Senator Biden.

Senator BIDEN. Thanks, Bill.

Chairman HATCH. We appreciate you being here.

Let me just ask all of you this question. The

Founding Fathers believed that the separation of powers in a government is critical to protecting the liberty of the people. Thus,

they separated the legislative, executive and judicial powers into three different coequal branches of government, naturally the legislative power being the power to balance moral, economic and political considerations and make law, the judicial power being the power only to interpret laws made by Congress and by the people.

In your view, is it the proper role of a Federal judge when interpreting a statute or the Constitution to accept the balance struck

by the Congress or the people, or to rebalance the competing moral, economic and political considerations? Mr. Ambro.

Mr. AMBRO. Mr. Chairman, I believe we are restrained to accept presumptively and give very significant-more than just significant weight to the legislative enactments and not to impose our own views on those. And therefore I believe that the deference and a presumption of validity should be given to any legislative enactment.

Chairman HATCH. Let me just ask you all under what circumstances do you believe that a court has a right to declare a

statute unconstitutional. Let's start with you, Mr. Ambro.

Mr. AMBRO. I believe that it would have to be in violation of the Constitution, and again there would be a presumption that the enactment is constitutional. It would have to be a rare case in which

there is a clear violation shown to be of the Federal Constitution.

The first thing you would look to is Supreme Court precedent, the precedent within your own circuit, and, if that doesn't exist, precedent that may exist elsewhere or analogous decisions of the Supreme Court or with your own circuit.

I might also add, Mr. Chairman, that in connection with your last question about judges in some way substituting their judgment for that of the legislature, James Madison wrote in the "Federalist Papers" that an elected despotism is not what we fought for. How much worse would it be if you had an unelected despotism with Federal judges acting and usurping legislative powers?

Chairman HATCH. Thank you. I have other questions, but I think I will submit them in writing and I would ask you all to answer them as quickly as you can.

Let me turn to Senator Biden. You have got to

forgive me. I have got to make a phone call.

QUESTIONING BY SENATOR BIDEN

Senator BIDEN. I won't be very long, Mr. Chairman, because you have asked very good questions and touched on some of the areas. I might note for the record that old expression "what is one's meat is another man's poison." I have just filed a lengthy amicus brief in the Supreme Court on my behalf to attempt to sustain the legislative position I took when I wrote the Violence Against Women Act and on the issue of a civil rights cause of action. The fifth circuit has overruled that in a case involving a college co-ed and three students.

The interesting thing there is it depends on which side of the coin you are looking at, from the conservative or liberal side, which the press likes to view it. I have a drawback. I teach separation of powers at Widener Law School, and I have been doing that for a while and it has become that old joke, if you want to learn it, teach it.

I find it interesting that this Supreme Court, in my view, is moving back toward what I would call a Lochner era rationale for their interpretation of section 5 of the 14th amendment in not giving deference to a rational basis for congressional action and deciding, as they did in the Lochner era, that we do not believe it meets the goals.

For example, if you remember those early cases, there was a case where the Court concluded on a matter relating to the safety of workers that although they did not disagree with the legislature's right to impose limited hours and certain work conditions, they concluded that those conditions would not promote the health and safety of the workers. Well, it is not the Supreme Court's business to determine what would promote health and safety. Their business is to determine whether or not we overstepped our bounds in basic constitutional law.

Now, my friends and others who are-by the way, the Senator from Utah, unlike many, is a serious constitutional scholar. I mean, this is not a hobby with him. He is a first-rate trial lawyer, but he also is one of the people here who has taken the time to hone his skills as a constitutional scholar, and it is real. He and I disagree on it.

He is very concerned that you don't overrule State legislative decisions, but not very much concerned about the Federal court overruling congressional decisions based on the power of the enforcement of the Commerce Clause and other things. So I am not going

to ask you any of those questions, except to state that it depends on which side of this you are looking at. And I find that moderates and liberals are equally as inconsistent as conservatives are in their interpretation of the separation of powers doctrine as it relates particularly to what constitutes the enforcement mechanism of section 5 of the 14th amendment.

But it does lead to me one question I want to ask each of you, and that is what your view-What is your definition of stare decisis? What is your notion of the degree to which you are bound, and how much leeway do you have? As I teach the course I teach, I think there is a very different standard we should apply as Senators in determining whether or not you go on the appellate bench or on the district court compared to what you do on the Supreme Court.

On the Supreme Court, you are not bound by anything, so I have an obligation, in my view, to understand much more clearly what your methodology for interpreting the Constitution is. I am satisfied, if there are men and women of integrity in front of me and they can rationally explain their view of stare decisis and what precedent they are to follow, that they will be men and women of honor and be bound by what they concluded, regardless of their political disposition and regardless of their methodology they would apply on the Supreme Court.

That is why I find it no problem to vote, as I have, for someone for the circuit court of appeals and vote against that same person for the Supreme Court of the United States when they have been put forward because I think there are different rules of the road. But I would like to hear, moving this time from right to left, what you believe to be your obligation under your view of what stare decisis is?

You two guys are going up, with the grace of God and the goodwill of the neighbors and 51 votes, to the circuit court of appeals in your various circuits. Is your obligation different, and where do you look?

How about in a situation where there is no case on point in your circuit? For example-and I am not asking you how you would rule on this; I want to make this clear. For example, there are conflicting decisions in the circuit on the Violence

Against Women Act on the civil rights cause of action. If there is not any precedent in your circuit-there now is, but if there is not any precedent in your circuit and there is no Supreme Court judgment that has been made do you have an obligation to look to the other circuits to see how the rule?

Mr. AMBRO. Senator Biden, I think your question-when you talk about stare decisis, it goes back 4, 5 centuries. When judges rode circuit in England and we had someone writing down the decisions and coming up with a "common law," it was for the purpose of having consistency because those who appear before judges, be they lawyers or, in England, barristers, and here the advocates, they need to know what are the balls and strikes and they need to have a consistent strike zone. And it is in that context that stare decisis gives all of us a road map for the future and all of us credibility before the public.

Senator BIDEN. Do you feel, Mr. Ambro, if there is no case on point, it is a case of first instance-again, I pick this case; I don't want to dwell on it. There are many other pieces of legislation I could name for you that are going to be challenged and parts of the challenged. But you have a case of first instance, which the civil rights cause of action is for women tinder my legislation, and you have divergent views in the circuit and no statement at all by the Supreme Court.

Now, it can be argued if you are basing the constitutionality of the legislation, as I have, on-I think it could rest on any of three parts of the Constitution, but if it were on the Commerce Clause alone, you may look to the Supreme Court's recent rulings on the Commerce Clause for guidance, but there is nothing on point. These guys are obliged by what their circuit says. You are clearly obliged by what the Supreme Court says, if it is on all fours. But

are you obliged by what other circuits say, other than looking to their reasoning? Are you obliged as a matter of law, as a matter of practice, to rule the same way?

Mr. AMBRO. Senator, I don't believe that you are obliged as a matter of law to follow--obviously, in this case by your example, you have two conflicting circuits. I think in this particular case, you would have to look, first of all, to the words of the statute and what did you and your colleagues mean when they put those words into the statute, and I would look to that first. Thereafter, you would look to these other circuits and, by analogy, decisions not only of those other circuits, but by analogy decisions of the Supreme Court, realizing that there is nothing directly on point.

Senator BIDEN. Mr. Chairman, again, I thank you, and I want to state something for the record here. There has been argumentation occasionally made, Mr. Chairman, if you have a chance to just listen to this one point, that this committee under your leadership has been reluctant to move on certain people based upon gender or ethnicity or race. And I know there are other potential nominees for the third circuit.

I want to make it clear and go on the record. I make no apologies and I take a back seat to no person in this body for my promotion of the interests of all Americans, particularly minorities. As a matter of fact, my other appointee was a minority that you put through.

I have found in my experience with you that there is absolutely no distinction made by you, other than what the record states.

And

the reason I say it, and I want to be very clear, is the chairman-Mr. Ambro's nomination was here less time than another nominee

for the court. There are aspects of the record of the other nominee that just require some additional work to clear. The other nominee is not a white male.

I am sure someone wanting to gain political advantage is going to say at some point down the line that you moved on Mr. Ambro and not on the other nominee. I will vouch for the fact that the other nominee, although I think is qualified, warrants additional follow-up with some questions, nothing about his integrity. This is a matter of filling in the record. And it may be unusual for you all to hear me say this, but I want to say it in an open forum, with the press listening, because I know that in acceding to my request, which I think is totally appropriate since it was clear as a bell--well-qualified by the ABA, as most of the nominees are, et cetera--you have moved, and I just want to make it clear that anyone who raises the issues of whether or not you are moving based upon--you are a little too conservative on who you like and don't like, but in my experience with you that has not a single thing to do with gender or race. I just want the record to show that. I realize I will get political heat for saying that, but it happens to be true, and so I want to thank you.

Chairman HATCH. Well, thank you, Senator Biden. There have been attempts by some to politicize this process and criticize the Judiciary Committee. Frankly, I think we have done a pretty darn good job under the circumstances. We are down to about 62; after you, there will be about 57.

Senator BIDEN. I just wish you had the same influence on the

floor of the Senate.

Chairman HATCH. That is right. Well, we get it done. It sometimes takes longer than I care to, but we get it done.

But we are down to basically a full judiciary, and we have 20 vacancies that don't even have nominees. And that has been true all

through this presidency, and every presidency for that matter. One thing that I have tried to do is never worry about a person's race or gender, just do the best you can for everybody. In fact, we never tell people on the floor what race a person may be. We think it is irrelevant to this process, or at least I do.

But it is always a heated process. Senator Biden went through unholy hell when he was chairman of this committee on judges.

Senator BIDEN. That is why I am doing foreign relations now.

Chairman HATCH. Yes; it is safe to say I go through unholy hell, but we try to do a good job and we try to make sure that people are treated fairly. There are all kinds of nuances to this particular jurisdiction of this committee and all kinds of nuances on the floor that I can't always control. But so far I think we have been able

to control a lot of things that have worked out for the betterment of this administration and its nominees.

In particular, I think this is a particularly good panel of nominees, and I am proud of each one of you and proud of the records

that you have established and the things that you have been able to do with your lives. You all have qualifications that I think justify your selection to these positions, and I will do my best to see

that we try and get you through.

If we finish tonight, you won't make it until the first of the year.

Senator BIDEN. "We" meaning the Senate.

Chairman HATCH. I am talking about the Senate.

Senator BIDEN. I think you are safe.

Chairman HATCH. I don't think we are going to finish tonight. We may not be able to get you all through before the end of this year, but you will be up shortly after the first of next year, and we will certainly bring you up in committee.

With that, I just want to commend each of you for having these nominations. It is a tribute to each of you and to the careers that you have and to the work that you have done and the reputations that you have established. We expect Federal judges to be beyond politics. We expect them to be people who uphold the law in every way and who interpret the laws, not make the laws. That is a cliché that is easier said than done, and we expect you to do justice.

And if you do that, then politics has no role in it.

We would like to try and get people who basically feel that way on the courts. Regardless of personal ideological beliefs, you are going to have to uphold the law, and if you do that, you are going to have a very strong supporter in me.

So with that, we just want-

Senator BIDEN. Mr. Chairman, may I make one last comment?

I apologize. It is the prerogative of the chairman to make the last comment, but I want to thank your families. This falls on deaf ears for the public at large because they look at your appointment for life and they look at the salary and it is more than the average American. It is the same salary, basically, that we make.

But for many of you-and I don't know each of your financial

backgrounds, but it is all in the record. It is confidential-most of you are making a significant sacrifice, making the judgment to go on the bench, and I want to thank your families for being supportive of you doing that. I realize to my dad, \$150,000 a year, roughly, is a king's ransom. And it is a lot of money, I acknowledge, and I make no complaint about we don't make that much. I make no complaint about that. But the public should know that the bulk of the people that come before us here are trading in jobs where they are making multiples of 2, 5, 10 and 15 times that much money.

I think you and I may be closer in age, Mr. Bye, but most of you are pretty young and you are coming at a time when your earning power is on the rise, not on the decline. And we thank you for doing it, and thank your families for allowing you to engage in public service as you have. So that is the only point I wanted to make, Mr. Chairman.

Chairman HATCH. Well, thank you, Senator Biden.

I join in Senator Biden's nice comments, and we are really happy to have had all you family members and friends here as well today. I think you have added a lot to this hearing. Even though you have not spoken, the fact that you have been here tells us a lot and that is important as well.

Thank you all for being here. We will try and move these as quickly as we can and we want to compliment each and every one of you on your nomination.

Mr. AMBRO. Thank you, Mr. Chairman.

MARYANNE BARRY
THURSDAY, JULY 29, 1999

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:06 a.m., in room SD-628, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Specter, Feinstein, Schumer, Smith, Torricelli, Sessions, Leahy, and Feingold.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. If we could begin. Today, we are holding a hearing for seven judicial nominees: two Circuit Court nominees and five District Court nominees.

This hearing follows the committee's approval of 16 judicial nominations earlier this year. We have three panels today. The first panel will consist of the sponsors of the nominees who will give brief statements on behalf of their nominees. The second panel will consist of the two Circuit Court nominees, and the third panel will consist of the five District Court nominees.

Before we turn to the panels, the Ranking Member is not here, but we will reserve time for him to make his opening remarks when he arrives.

Chairman HATCH. If I could interrupt, Senator Boxer. I did not realize that Senator Specter, who is very senior on this committee,

was here to speak in favor of Maryanne Trump Barry and others.

So I would he to interrupt and call on Senator Specter at this time, and then we will go to you and Congressman Campbell.

Senator SPECTER. Thank you, Mr. Chairman. I will take only a moment or two.

Chairman HATCH. I would like to have our statements be as short as we can because we do want to get this hearing started, as we are going to have votes all day, and I do want to get through with this hearing.

Senator SPECTER. As I said, I will just take a moment or two, and I have to excuse myself after this brief statement.

I want to commend you, Mr. Chairman, for moving ahead with the judicial nomination process and to say a few words in support of Judge Maryanne Trump Barry.

I compliment the President on his bipartisan approach. There are two vacancies coming from New Jersey. One will be a Democrat, and one, a Republican, and I compliment Senators Lautenberg and Torricelli for their bipartisan approach and we are trying to extend that bipartisanship to the Third Circuit and to the Pennsylvania selections, I might add.

Judge Barry comes to this nominating process with an extraordinary record. She has served on the U.S. District Court for the District of New Jersey since 1983. She has been a part of the panel of the Third Circuit by designation. Before becoming a judge, she was in the U.S. Attorney's Office where she was a first assistant and executive assistant. She has an extraordinary record of community service and legal scholarship, and I think she will make an excellent addition to the Third Circuit.

Mr. Chairman, I yield back the balance of my time.

Chairman HATCH. Thank you, Senator Specter. We appreciate it.

This is high praise for these nominees coming from Senator Feinstein and Senator Specter who are Members of the Committee.

At this point, I understand Senator Lautenberg is coming. So let me turn first to Senator Torricelli.

STATEMENT OF HON. ROBERT G. TORRICELLI, A U.S. SENATOR
FROM THE STATE OF NEW JERSEY

Senator TORRICELLI. Thank you, Mr. Chairman. Mr. Chairman, I want to thank you very much for the extraordinary speed in which to be able to deal with the nomination of

Maryanne Trump Barry for the Third Circuit Court of Appeals.

She is, as I am certain you have now recognized, eminently

qualified. Indeed, of all the District Court Judges in New Jersey,

when it came time for the President to choose to elevate someone

to this position on the Third Circuit, it is remarkable how little debate there was about the possible candidates. Indeed,

from the recommendations of Members of your party, the President to Members

of the Senate, it was a very, very clear choice.

In large measure, this is a reflection not only of her extraordinary service on the district court, but indeed the reputation-she

has developed in judgment and in temperament.

I would like, Mr. Chairman, just to tell you a few things about

her career. So the confidence I know you already feel in her nomination can only be strengthened.

She is a graduate of Mount Holyoke. She received her master's

degree from Columbia University and her law degree from Hofstra.

Recognizing the best thing to do with a New York education is to

move to New Jersey, she then moved and worked in the U.S. Attorney's Office in New Jersey-

Senator LEAHY. You want to make sure you get all the votes

around here, don't you, Bob?

Chairman HATCH. We suddenly have conflict on this eminent committee.

Senator TORRICELLI. She rose through the ranks in New Jersey,

first serving as the Chief of Appeals and then as the first assistant

U.S. attorney.

At the time, Mr. Chairman, interestingly, she was the highest-ranking female prosecutor of any U.S. Attorney's Office in the

Nation.

In 1983, President Reagan nominated her for the U.S. district

court, where she has been serving since. She is also, Mr. Chairman,

a former president of the Association of the Federal Bar for the

State of New Jersey.

I cannot think of anyone that the President could have nominated who is more eminently qualified, and mostly, due to

the vacancies in our court and the business before that court, I am very

grateful to you for having moved this nomination so expeditiously.

Chairman HATCH. Thank you, Senator Torricelli. I think it is a real

compliment to Judge Barry that you have come here and spoken

so eloquently on her behalf, and we appreciate it.

We will interrupt when Senator Lautenberg comes. He is not

here yet. We will certainly accommodate him when he comes, but

let me turn to Senator Schumer, who speaks for our three New

York nominees.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR

FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman. I want to congratulate you for holding this hearing in the way that you have

moved these nominations along with dispatch.

I also want to express on behalf of myself and Senator Moynihan, who could not be here today, our deep thanks for you attending to New York's judicial needs. Looking at today's slate of nominees, it is clear to me that you deserve today the title of Honorary New Yorker, which I hop will serve you well in Utah.

Chairman HATCH. Listen, I am deeply honored. We Utahans have always wanted that recognition.

Senator SCHUMER. Yes, indeed.

He has many fans in New York.

Senator LEAHY. He does not even talk about being born in Pennsylvania when he goes out to Utah.

Chairman HATCH. You did not have to mention that one. I will tell you, I am proud of all three States. I just wish Vermont would be a little more supportive.

Senator LEAHY. Now, Mr. Chairman, here I am organizing Democrats for Hatch in Vermont.

Chairman HATCH. I am going to remember that.

Senator LEAHY. With those three electoral votes, I am going to put you over the top, and you diss our State like that.

Chairman HATCH. And to think, he does not even have a judgeship on this panel.

Senator LEAHY. No, but I will try to find one.

Chairman HATCH. All right.

Senator SCHUMER. All right, I am sorry I brought all that up.

We have Senator Lautenberg here. The vote has begun. I wonder if you folks could go vote and then come back. The trouble is, we have got three votes in a row, as I understand it. So what I am going to try to do is keep this confirmation hearing going, even during those three votes, if we can.

Senator Sessions, if you could go over and vote and then come right back.

Senator Lautenberg, we will be happy to take your statement.

STATEMENT OF HON. FRANK R. LAUTENBERG, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thank you very much, Mr. Chairman and Members of the Judiciary Committee.

It is a distinct honor and pleasure today to recommend Judge Maryanne Trump Barry to be a U.S. judge for the Third Circuit, and I want to commend you, Chairman Hatch, for moving forward with this and the other nominations that are before the committee today.

We must ensure that the judiciary is fully staffed so that all citizens will receive prompt justice, and again, I thank you for taking

this step to provide that kind of service to our citizens.

I know this committee is familiar with Judge Barry's excellent credentials, and I will try to keep my remarks brief.

I had the honor of presenting her to this committee after her nomination by President Reagan in 1983. It was the first time that I had a chance to present one of our distinguished persons from New Jersey, and since that time, she has compiled an impressive record on the District Court, become a nationally recognized expert on a wide range of criminal and civil law matters.

Her knowledge of criminal law led Chief Justice Rehnquist to appoint her to chair the Committee on Criminal Law of the Judiciary

Conference of the United States. It was a position that she held from 1993 to 1996, a testimony to her outstanding credentials

Additionally, the Federal Judiciary Center asked her to make an instructional videotape called "How to Try a Complex Criminal Case," and that tape is being played for all new District Court Judges at their orientation seminars.

In the area of civil law, Judge Barry has issued many important rulings, including a decision that Blue Cross was required to pay for a bone marrow transplant for a terminally ill young girl who would have certainly died without the procedure.

While her judicial colleagues hold her in high regard, Judge

Barry is also well respected by the many attorneys who have appeared before her. I have spoken to them, and the praise was universal. They praised her command of the law, her professional demeanor, and her razor-sharp wit, which she does not hesitate to

use when cutting short a particularly loquacious presentation.

Chairman HATCH. A little bit like yours, I suppose.

Senator LAUTENBERG. I would like to use her as a model, sir, undoubtedly.

Her years in prosecuting cases as an Assistant U.S. Attorney led her to her appreciation of fair and considerate treatment of all members of the Bar.

As a result of her tenure in the U.S. Attorney's Office, her 16 years of outstanding service at the District Court level, and her legal expertise, Judge Barry is well prepared for the elevation to the Circuit Court. In fact, she has already sat by designation on the Court of Appeals and written several opinions.

Mr. Chairman and Members of the Committee, I highly recommend Judge Barry, and I know that you will help move her

nomination through the full Senate. As you know, the Third Circuit is currently facing a judicial emergency. The appointment of Judge

Barry will help relieve that situation to further address the crisis.

Mr. Chairman, I hope that the committee will soon take up the nomination of another excellent candidate for the Third Circuit, Judge Julio Fuentes, and a District Court opening that Faith Hochberg, U.S. attorney, has been recommended for.

I thank you, Mr. Chairman and all the Members of the committee, for your time and consideration. We are pleased and lucky

to have someone of Judge Barry's talent with us, and I thank you.

Chairman HATCH. Thank you, Senator Lautenberg. We appreciate it, and it is very high praise indeed. We appreciate it.

Chairman HATCH. I think what we are going to do is swear in the two Circuit Court Judges and have you introduce your families, and then we are going to have to go vote. So, if the two Circuit Court Judges will come forward.

Judge Barry and the Honorable Ray Fisher, would you both raise your hands. Do you swear the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge BARRY. I do.

Chairman HATCH. Thank you.

If we could, rather quickly, Judge Barry, would you mind introducing anybody you have with you here today.

TESTIMONY OF HON. MARYANNE TRUMP BARRY, OF NEW JERSEY, TO BE U.S. CIRCUIT JUDGE FOR THE THIRD CIRCUIT

Judge BARRY. Yes. Thank you, Mr. Chairman. Thank you, Members of the Committee, for the opportunity to appear before you

today.

My husband and my son wanted very much to be here. My son

is quite ill, and my son is being operated on as we speak. I am not totally bereft of family, though. My nephew, Donald Trump, Jr., is here. Unfortunately, Senator Schumer, he is going to Wharton, about to graduate from the great State of Pennsylvania, and my law clerks, Jennifer Rochon, Sarah Coyne, and a former law clerk, Cori Flam, who now works on the House side for the Minority Counsel, also a friend, Nadia Stone.

I thank you again for the opportunity to appear before you. I hope it is also a pleasure.

Chairman HATCH. We are delighted to have you here, and I think it will be a pleasure. You never know about this committee, but I think it will be fine. We are happy to welcome all of you here, and we are honored to have the two of you before this committee.

I think what we are going to do and we do not have much choice, we have the reconciliation bill up, which is the tax bill, all day today, and we are going to have vote after vote after vote, but I think when we get these three votes over with, I think we will have a period of time because Senator Gramm is going to bring his amendment up and suspect that will cause quite a furor on the floor for a while. We should be able to finish this hearing after we get back, but I think rather than disconnect this hearing, we will recess until we can get these three votes over, and we will come back as soon as they are over. We will start with the two of you and then go to our five District Court nominees.

So, with that, we will recess until we can get back.

Chairman HATCH. I apologize for the delays here, but that is just the way life is around this place. So we are happy to have both of you here. We are pleased with your patience, and it stands you in good stead to be circuit judges to have this kind of patience.

Do either of you want to make a statement? Judge Barry.

Judge BARRY. Just to repeat that I am so grateful for the opportunity to be here. And I was remiss when I spoke earlier, Mr.

Chairman, not to have thanked Senator Torricelli, who has been so helpful to me in every way, for his kind remarks this morning, and Senator Lautenberg and, of course, Senator Specter from Pennsylvania. And I would be very remiss if I did not put that on the record.

Chairman HATCH. You bet. We are happy to have you do it.

Now, Judge Barry, as a former assistant U.S. attorney and as a Federal judge, you have had substantial experience in criminal law. Indeed, you chaired the Committee on Criminal Law for the Judicial Conference of the United States. In that position, you opposed the mandatory minimum sentences. As an appellate judge, will you apply mandatory minimum sentences to convicted criminals-even if you personally disagree with the statutory minimum?

Judge BARRY. Absolutely. We apply the law whether or not we agree with the law. That is our job, and, of course, when I spoke and wrote against mandatory minimum sentences, it was as a representative of the Judicial Conference.

Chairman HATCH. Well, you have every right to do that, and I think judges should speak out. If they think that the laws we pass are not working well, they ought to speak out. Frankly, I have some qualms about the mandatory minimum sentences. I am a supporter of them, but I also want them to work, and work fairly. And in

some cases they don't, and we have got to try and find out how to resolve those. So if we had more help from Federal judges on this committee, we could do even better.

Chairman HATCH. Now, for both of you, the Founding Fathers believed that the separation of powers in a government was a critical provision protecting the liberty of the people. Thus, they separated the legislative, executive and judicial branches into three different branches of government, the legislative power being the power to balance moral, economic and political considerations and to make law, the judicial power being the power only to interpret the laws made by Congress and by the people.

Now, in your view, is it the proper role of a Federal judge when interpreting a statute or the Constitution to accept the balance struck by Congress or the people, or to rebalance the competing moral, economic and political considerations?

Judge Barry.

Judge BARRY. I agree.

Chairman HATCH. OK. Under what circumstances do you believe it appropriate for a Federal judge to declare a statute unconstitutional? Judge Barry.

Judge BARRY. You start with a presumption of constitutionality, and you start with another provision that is well-known in the law that you try to avoid reaching a constitutional issue if there is another basis on which to decide the case. I would be very conservative, very careful before declaring an act unconstitutional. One must look at the Constitution itself, first and foremost. What does it say? One must look at the intent of the Framers. One must look at Supreme Court precedent and precedent from one's own circuit, which binds. Then one would go to analogous cases from other circuits, if there is nothing on point, and to legislative history. How did Congress think that this statute should be interpreted? It is a long process, it is a difficult process, and it is one we would approach with much trepidation.

Chairman HATCH. But what would you do if you believed in your heart that the Supreme Court or the circuit court had erred in rendering a decision-seriously erred-let's put it that way-seriously erred in rendering a decision? Would you nevertheless apply the decision on your own best judgment of the merits? You could take, for example the Supreme Court's recent decision in *City of Boerne v. Flores*, where the Court struck down the Religious Freedom Restoration Act, in part.

Judge BARRY. If I agreed with that decision or I disagreed with it, it is an irrelevancy. I would apply binding precedent.

Chairman HATCH. You both have indicated that you would be bound by Supreme Court precedent and, where applicable, the rulings of the Federal circuit court of appeals in your circuit. There may be times, however, when you will be faced with cases of first impression.

Now, let me ask you what principles will guide the two of you, or you individually, and what methods would you employ in deciding cases of first impression.

And I think you have basically answered that,

Judge Barry.

Let me just ask you this. In addressing the cases that deal with the proper role of the States and the National Government in our system of federalism, it is important for an appellate judge to follow the text and history of the Constitution, as well as the precedents of the Supreme Court.

For example, Article I, section 8, of the Constitution enumerates

several limited powers of Congress, and the Tenth Amendment reserves powers not granted to the Federal Government to the States

or to the people, as you know. In your view, what role do the States have in our constitutional form of Government?

Judge BARRY. The States have a very broad role. And indeed in the criminal context, which you flattered me earlier alluding to my background, the States are the bastion of law enforcement. The people reside in the States, the people are in their local communities. The States have broad powers. The Federal Government has much more limited powers.

Chairman HATCH. Judge Barry, are you basically in agreement with that?

Judge BARRY. It is the toughest standard and I would apply it.

Chairman HATCH. Now, with regard to capital punishment do either of you have any legal or moral beliefs which would inhibit or

prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a Federal judge?

Judge BARRY. No, and Supreme Court precedent would be followed.

Chairman HATCH. Let me turn to Senator Smith for any questions he may have.

Senator BOB SMITH. Thank you, Mr. Chairman. Good morning.

Judge BARRY. Good morning.

Senator BOB SMITH. I have been frustrated over the years that I think oftentimes when people come before the committees and are asked questions about various issues, some of them controversial, it seems like the ones who don't answer them get confirmed and the ones who do don't. So I have some questions that I would appreciate you doing the best you can to answer them. I didn't hear-I came in late. Did Senator Hatch ask you if you believed in the constitutionality of the death penalty? If he didn't, would each of you answer that question?

Judge BARRY. My answer is the same, Senator.

Senator BOB SMITH. Thank you. If a judge on an inferior court other than the Supreme Court concluded that a Supreme Court precedent was unconstitutional, are there any circumstances where you could refuse to apply that precedent in a case before you?

Judge BARRY. I will answer no. I would apply binding precedent. I am required to do so, whether or not I agree with it.

Senator BOB SMITH. So you have to apply the precedent, regardless?

Judge BARRY. Yes.

Senator BOB SMITH. What about if you look at-in the Dred Scott case, for example, in which there was no precedent because it didn't get-it was overturned, I believe, by the 14th Amendment, but in the Dred Scott case where a black man was denied the opportunity to sue in Federal court because he was property, and that decision was handed down by Chief Justice Taney in a majority opinion, if that case had come before the Court and had been determined that that precedent was allowed to stand, you don't believe

there would be any justification to break precedent in that case?

Do you agree with that?

Judge BARRY. Yes, I do, Senator.

And I would agree with that.

Senator BOB SMITH. So I guess what you are saying to me is there are no circumstances where you would vote to overrule precedent.

Judge BARRY. Not as a lower court judge.

Senator BOB SMITH. I understand you are not on the Supreme Court here. I understand, but I mean there are precedents.

You answered the question when Senator Hatch asked you if you had any personal, moral or religious qualms about the death penalty. That is a personal question and you answered, no, you did

not. Let me ask you a personal question. In your mind, outside the law, strictly personal, is an unborn child a human being?

Judge BARRY. If I answered a personal opinion on the death penalty whether I believe in it or I don't, I didn't mean to speak personally. I am bound to apply the death penalty, were I to remain on the district court or to consider cases on the appellate court in which it has been applied, and I am bound by the precedents of the Supreme Court.

My personal opinions on any subject are really not relevant, not important. And to the extent I might inject them, I am acting improperly as either a district court judge or as an appellate court judge.

Senator BOB SMITH. Well, that is right, but I am asking you for your personal opinion on this question. Do you believe that an unborn child at any stage of the pregnancy is a human being?

Judge BARRY. Casey is the law that I would look to. If I had a personal opinion-and I am not suggesting that I do-it is irrelevant because I must look to the law which binds me.

Senator BOB SMITH. If you were a Supreme Court justice, I am assuming you would agree that a Supreme Court justice, because it

is the Supreme Court, could break precedent and vote to overturn a decision such as Plessy v. Ferguson or Roe v. Wade, correct?

Judge BARRY. Yes, because stare decisis is a very important principle in our system of jurisprudence.

Senator BOB SMITH. Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

We will now turn to Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

Ms. Barry, I would just ask a few questions. You got a couple of pluses in my book by being a long-time assistant U.S. attorney, first assistant, executive assistant, chief of the appeals division. I think that is a good background for the Federal court.

I guess you practiced full-time in Federal court for most of your career. Is that correct?

Judge BARRY. Yes, Senator.

Senator SESSIONS. Some would say that would be one side of the coin, but I think your experience as a district judge, I am sure, has given you a breadth of experience that would assist you on the court of appeals.

I notice that you have written-and I am not sure quite the details of it-questioning the Sentencing Guidelines and mandatory

minimums. What have you written to the Congress with regard to those issues and how do you feel about them?

Judge BARRY. All right. I have written to the Congress as Chair of the Criminal Law Committee of the Judicial Conference of the United States, and I have written on occasion as to mandatory minimums and the Sentencing Guidelines articulating the Judicial Conference's position.

I have always said when I wrote those letters--and basically

they are written with reference to legislation that Congress is considering-I have always said that it is the position of the Judicial

Conference that it is Congress that has the power and the authority to decide sentencing policy and to decide sentencing policy questions, and to determine whether or not it wishes to enact mandatory minimum sentences. But we have opposed as a longstanding matter mandatory minimums for primarily two reasons. Judges agree with Congress that

drugs and violent crime are seriously hurting this society, and they agree that they must be strongly punished. But the mandatory minimums have operated unfairly in quite a number of cases, very unfairly.

And we look at the mule for example, bringing drugs in from one of the drug capitals of the world. It is fortuitous whether he is bringing in 100 grams, 1,000 grams, 4 kilos, but it is the amount of the drugs under the mandatory minimum that sets the sentence, with no mitigating factors to be considered.

And the second reason that the Conference has traditionally opposed mandatory minimums, or at least since the Guidelines have

come into effect, is that the Guidelines work at cross-purposes with the mandatory minimums. They are two separate sentencing schemes, both set up by Congress, and they do not operate gently together.

One is an individualized, if you will, form of sentencing. The other is more a charge-based offense. And the thing that is quite interesting is that when one considers for a mandatory minimum defendant what his guideline range would be, interestingly in the majority of cases it is right at about what the mandatory minimum sentence would be. But there is the ability to then put into play, were there no mandatory minimum sentence, the considerations that Congress believed important when it enacted the Sentencing Guidelines.

That having been said, whether I have a personal feeling about the mandatory minimums, whether I don't, I will always apply them when the cases come to me.

Senator SESSIONS. Well, I think you made just about as good a statement of the opposing view as could be made. I think it is worth discussing. One reason the Guidelines are consistent with the minimum mandatories, I believe, is because they had to accommodate to the minimum mandatories and have tried to be consistent with them, which the Sentencing Commission should.

But in the long run I believe that a wise application of minimum mandatories and Sentencing Guidelines is beneficial for consistency of sentencing, and also to send a clear message. So I would disagree with you on the policy, but the most important thing is that

you would follow the law as it is set forth by the Congress.

I remember when the things were being considered, and I attended an Eleventh Circuit, Judge Tjoflat, who was on the commission at the time, was asked some questions by the judges, some of whom were aghast that their freedom to sentence any way they wanted to—I mean, I have gone in with drug cases in which there would be probation or 25 years for virtually the same offense, depending on the judge. And he said, gentlemen, the truth is the

Congress doesn't trust you to sentence. I don't know if that was the motivating factor, but perhaps it was.

Mr. Chairman, my time is expired. Thank you very much.

Chairman HATCH. Thank you. I appreciate.

Senator SESSIONS. Let me just say both of these nominees have extraordinary academic backgrounds and seem to be men and

women of integrity and ability, and I am pleased to see them nominated.

Chairman HATCH. Well, thank you. I am, likewise.

I have to say that it is important for people to understand that judicial activism-that is, judges making laws rather than interpreting the laws-is wrong, whether it comes from the left side of

the table or the right side of the table. You know, a lot of people don't realize that conservative judicial activism is just as wrong as liberal judicial activism.

You both have answered these questions, I think, very fairly, and that is that you are going to abide by the precedents of the Court. Even if you agree or disagree with them, you are going to abide by those precedents, and that is all you can do as a lower court judge.

Senator BOB SMITH. Mr. Chairman, I would just make a point on that, and I understand that and I respect that you both have to say that. But precedents on the Supreme Court are set on the basis of people's personal views. Many times, that has happened.

For example, prior to Roe v. Wade, if I asked you whether or not there was a constitutional right to abortion, what would you say?

There is no precedent here now, so I am asking was there a constitutional right to abortion prior to 1973 when the precedent was set.

Chairman HATCH. As much as I agree with your position on that, that is not a fair question to these two nominees here because regardless of what happened pre-1973, they have to abide by what

has happened post-1973 and the current precedents that the Supreme Court has.

Senator BOB SMITH. Mr. Chairman, I understand that, but my point is that precedent is set because-Senator Sessions just mentioned

the case where a justice's personal views on the death penalty impacted his decisions in setting precedent, if his view had prevailed,

which it did not. That is all I am getting at.

I am not trying to have you pre-judge a case, and I understand you can't do that, but it is difficult for us in the advise and consent role if we can't get into your minds a little bit. You could very well be a Supreme Court justice in the future, and so I am just trying to understand where the thinking comes here.

Precedent is one thing, but I don't think you can always separate-when you are setting the precedent as a Supreme Court justice, should you be a Supreme Court justice, I don't think you can always separate your personal views from the law because you are establishing the law with that precedent. That is the point that I am making.

Chairman HATCH. If I could just add, I think those are interesting comments. I have to say that judges, if they don't abide by the rule of law, then they shouldn't be on the bench, especially lower court judges, and especially circuit court judges. I mean, this is the closest thing to the Supreme Court, and the circuit courts decide thousands and thousands of very important cases that the Supreme Court is never going to decide. So I don't know how you could have answered any differently than you did.

Again, I would just caution both of you that I have seen terrific liberal circuit judges and I have seen lousy ones. And I have seen terrific conservative circuit judges and I have seen lousy ones. The key is do you understand the role of judging and will you apply the most honorable, honest approach that you possibly can to the cases that come before you. I will tell you one thing, I have no doubt that

both of you will do that, and so we strongly support you and we will get you out of this committee as soon as we possibly can. We think both of you have led very distinguished careers and we are honored to have both of you with us today. So with that, we may put you on-in fact, we may put all the judges on today's judiciary markup. And if we can, we will try to get you out and through the floor as quickly as we can because you are excellent-people and we are honored to have you here. So we thank both of you for being here. We will do the best we can to get you out of the committee as soon as we can.

Judge BARRY. Thank you, Mr. Chairman.

Chairman HATCH. Thank you.

MARSHA BERZON
THURSDAY, JULY 30, 1998

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 1:01 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Jeff Sessions presiding.

Also present: Senators Specter, Kennedy, and Feinstein.

OPENING STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. This hearing will come to order.

Senator Moynihan, I believe you have someone you would like to introduce to the committee. We would be pleased to hear your remarks at this time.

STATEMENT OF HON. DANIEL P. MOYNIHAN, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator MOYNIHAN. Thank you, Mr. Chairman. I have a passel of New Yorkers present and past. Would you like them to come up first, or-

Senator SESSIONS. That would be fine. I would be pleased if you would invite them up. We had some other Senators appearing, but they have not arrived, so it will be the New York time.

Senator MOYNIHAN. All right.

And finally, a very special occasion for us, would Marsha Siegel Berzon come forward?

Senator SESSIONS. Very good, if you will please have a seat.

Senator MOYNIHAN. Have you ever seen so many New Yorkers in one place?

[Laughter.]

May it please the court if I just give you a brief introduction to these distinguished candidates who appear before you at this point.

Finally, it is a very special pleasure, Mr. Chairman, to introduce to you Marsha Siegel Berzon, who has been nominated for the Ninth Circuit Court of Appeals. She is a native New Yorker and

spent her youth in Sheepshead Bay and Brooklyn and East Meadow, Long Island. When she testifies, a learned ear will recognize

those origins and, I hope, celebrate them. She graduated cum laude from Harvard/Radcliffe College and earned her law degree at Boalt Hall School of Law at the University of California. She was law clerk to Justice William J. Brennan, a blessed memory. She has been a faculty lecturer in the School of Social Welfare at the University of California and a practitioner in residence at

New York Cornell Law School. She is currently a partner at Altshuler, Berzon, Nussbaum, Berzon and Rubin in San Francisco.

With that, sir, I present to you this venerable and honored body, these distinguished New Yorkers. I see your colleague, Senator Feinstein, is here, and she, of course, has a Californian before us, as well. I thank you, sir, for this opportunity, and I think you would probably like to call the nominees up personally one at a time.

Senator SESSIONS. I think we may try to have them all stay up.

Senator MOYNIHAN. Very well, sir.

Senator SESSIONS. Thank you, Senator Moynihan, for your very wise and insightful introduction. That was most fitting for the occasion and we appreciate it very much.

I see Senator Boxer has arrived and I know she would like to make some comments before we begin. Senator Boxer, we would be delighted to have your comments at this time.

STATEMENT OF HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Mr. Chairman, I will be very brief because I know Senator Feinstein, as a member of the committee, will have much to add about Marsha Berzon, and I will actually skip over her incredible qualifications because I would leave that to my colleague to present to you.

I wanted to thank Senator Moynihan for saying those kind words about Marsha Berzon. We are absolutely delighted to have her here because we think she is eminently qualified to sit on the U.S.

Court of Appeals for the Ninth Circuit. I wanted to introduce Stephen Berzon, Marsha's husband, and ask him to stand. She has been married to Stephen since 1967.

Along with Mr. Berzon is their daughter, Ali, their son, Jeremy, and Marsha's father, Jack Siegel. Unfortunately, her mom, Sylvia Siegal, could not be here due to health reasons, but Marsha has also brought her brother, Arthur, and there are more-her sisters, Beth and Mariam, and her nephew, Adam. So she has an entire cheering section here in addition to Senator Feinstein and myself.

Senator SESSIONS. It is good to have you here.

Senator BOXER. I am going to skip over all the details of the resume and leave that to my good colleague. What I wanted to concentrate on, really, is Marsha's incredible bipartisan support. I

would like to put that on the record. Here are words from a few of those supporters, Mr. Chairman, because I know that is very important to this committee.

Our own Senator from Pennsylvania, Senator Specter, who sits on the committee, said in a letter dated July 10 of this year that he was impressed with Marsha Berzon's "intellect, accomplishments, and the respect she has earned from labor lawyers representing both management and the union." I am very pleased that Senator Specter has made those comments.

Former Republican Senator James McClure of Idaho in support of Marsha's nomination writes, "What becomes clear is that Ms. Berzon's intellect, experience, and unquestioned integrity have led to strong and bipartisan support for her appointment."

J. Dennis McQuaid, a Republican and an attorney who, by the way, ran against me in my Congressional race in 1982, writes, "Unlike some advocates, she enjoys a reputation that she is devoid of

any remotely partisan agenda. Frankly, her presence will enhance the reputation of the ninth circuit."

California State Superior Court Judge Michael Johnson, who was appointed by Governor Wilson, believes Ms. Berzon, "is a brilliant appellate attorney, and she would be an excellent addition to the ninth circuit."

Associate Justice of the State of California Court of Appeal Paul Haerle, who was appointed by Governor Wilson, thinks she would make, "a fine appellate court judge".

We have Fred Alvarez, who was appointed by Ronald Reagan to the Department of Labor, recommending her, "without hesitation".

Charles Curtis, who was the opposing counsel in the United Auto Workers v. Johnson Controls, Inc. writes, "All who have worked with her or against her know that she is fair, reasonable, and respectful toward opposing views."

The California Correctional Peace Officers Association represents correctional peace officers employed by the State of California.

Their organization has endorsed Republican Governors Deukmejian

and Wilson and they say about Marsha, that she is "among the best legal practitioners in the country."

So I am just so pleased to introduce her to you. Her other supporters include the International Union of Police Associations, the

national Association of Police Organizations, the Los Angeles County Professional Peace Officers Association, and the corporate secretary for Chevron Corp. and a Republican, Lydia Beebe, writes that Ms. Berzon has a "reputation of being a brilliant attorney and of imposing an extremely high intellectual standard to whatever she does. She has the support of many in the employment and labor law community, both on the plaintiff and management side."

I think the record will show this is a nominee who is just perfect for these times, and I am very hopeful that after hearing my good colleague make what I know will be an eloquent presentation that we will be able to move her forward and move her forward favorably.

Thank you so much, Mr. Chairman.

Senator SESSIONS. Thank you, Senator Boxer.

I believe Senator D'Amato has arrived and would like to make some comments. We appreciate your insight, Senator D'Amato.

STATEMENT OF HON. ALFONSE M. DAMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator DAMATO. Thank you very much, Mr. Chairman. I am going to ask that all of my remarks be placed in the record as if read in their entirety because of the time constraints that the committee faces.

Let me say it is, indeed, a great pleasure and an honor to have five such distinguished jurists and jurists-to-be before this committee. The President has nominated wisely.

I note that while this is the first time that I have had the opportunity to meet Marsha Siegel Berzon, that we share a very common

background, I having been born in Brooklyn and moved to Nassau County at the age of 8, Marsha Siegel Berzon having lived in Brooklyn and moved to Nassau County and, indeed, the same town, the town of Hampstead in the community of East Meadow, having moved there at the age of 8. From there on, things begin to change.

[Laughter.]

I cannot say to you that my academic endeavors ever made it possible for me to attend the great universities which she did, and not only attend them, but graduate at the top of her class, graduating No. 1 from East Meadow High School as the valedictorian, No.

1. I will not tell you what number I graduated from my high school.

[Laughter.]

Senator SESSIONS. We have not put you under oath yet.

Senator DAMATO. Indeed, I think the President has nominated wisely and I am delighted to be supportive of a nominee who was a former Long Islander who came from my own town where I served as the supervisor while she was going through high school.

Senator SESSIONS. Thank you very much, Senator D'Amato. We appreciate those good remarks. I know you and Senator Moynihan are rightly proud of these nominees.

Senator DAMATO. Thank you, Mr. Chairman.

Senator SESSIONS. Thank you.

Senator Feinstein, I know, has a personal recommendation or some comments she would like to make and I would recognize her at this time.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR
FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. I thank you, Mr. Chairman. I would ask your consent to enter into the record a statement of the ranking member, Senator Leahy, and the full statement of my colleague, Senator Boxer, for the record.

Senator SESSIONS. That will be made a part of the record.

Senator FEINSTEIN. As Senator Boxer said, Mr. Chairman, I would like to just have an opportunity to fill out the details and credentials of Ms. Berzon's background. She earned a B.A. degree cum laude from Harvard. She received her law degree from Boalt Hall School of Law at the University of California-Berkeley. She earned the Order of the Coif and she was an articles editor for the California Law Review.

On graduation from law school, she clerked for U.S. Court of Appeals Judge James Browning and for U.S. Supreme Court Justice

William J. Brennan. Following her clerkship, she practiced law from 1975 to 1977 as an associate at the Washington, DC, law firm of Woll and Mayer. Since 1978, she has practiced with the San Francisco law firm of Altshuler, Berzon, Nussbaum, Berzon and Rubin, where she has been a partner since 1990.

She specializes in appellate litigation, a practice that has made her quite familiar with Federal appellate courts. She has appeared numerous times before the circuit courts, the district courts, and all levels of California State courts. She has argued four cases before the U.S. Supreme Court and has filed dozens of briefs on a wide variety of cases before the Supreme Court. Her client list is varied and she has been chosen to represent the governments of the States of California and Hawaii, the city of Oakland, CA, in major court cases.

Her nomination enjoys the support, as my friend and colleague, Senator Boxer, pointed out, of law enforcement as well as broad bipartisan support.

Senator Boxer quoted from the Correctional Peace Officers Association and I want you to know that these kinds of commendations

by this particular association generally fall toward Republicans, and I would just like to read the full statement because I think, indeed, it is quite remarkable.

“As the peace officers who walk the toughest beat in the State inside our State prisons, we have been and continue to be strong supporters of the death penalty.

With this background, we have examined the abilities, career, and reputation of

Marsha Berzon. We know that her talents as a lawyer place her among the best

legal practitioners in the country. We believe that Ms. Berzon will rigorously enforce

our Federal criminal laws and will review our State's criminal laws if they are challenged by criminal defendants with a perspective of the needs of law enforcement

and of the working peace officer.”

She enjoys the bipartisan support of a wide range of practitioners, including many attorneys whom she has opposed in litigation.

Former Idaho Senator James McClure and three of his law partners wrote, "Ms. Berzon's intellect, experience, and unquestioned

integrity have led to strong and bipartisan support for appointment. She is a consensus nominee."

W.J. Usery, Jr., former head of the Federal Mediation and Conciliation Service under Presidents Nixon and Ford and Secretary of

Labor under President Ford wrote,

“She has all the qualifications needed as well as the honesty and integrity that

we need and deserve in our court system today. I know she will be dedicated to the principles of fairness and impartiality in all of her judicial activities.”

Doug Barton of the San Francisco law firm of Hanson, Brigit, Marcus, Blahos and Rudy wrote, "She is, in my opinion, not only a person of extraordinary intellect and proven legal ability, but also one who is highly principled, objective, and fair minded.

Even though she has represented clients and interests which are often adverse to the clients and interests I have represented, I have never found her to be doctrinaire or ideological in her approach to legal issues.” I think that is an important statement.

Dennis McQuaid, an active Republican-as a matter of fact, he ran against Senator Boxer once-and partner at the San Francisco law firm of McQuaid, McQuaid, Metzler, McCormick, and Van Zant, wrote, "Marsha Berzon has generally represented clients and organizations to which my clients almost invariably would be opposed or with whom they would be in conflict. Nevertheless, I can

recommend Marsha for confirmation without reservation. She enjoys a reputation that is devoid of any remotely partisan agenda

and that her service on the court will be marked by decisions demonstrating great legal acumen, fairness, and equanimity."

So I am very pleased to join with my friend and colleague, Senator Boxer, in introducing Marsha Berzon to this committee today,

and heartily recommend her for confirmation to the U.S. Court of Appeals for the Ninth Circuit. I thank the chair.

Senator SESSIONS. Thank you very much, Senator Feinstein.

Are there any other opening statements?

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. I just have a brief one, if I could, Mr. Chairman.

Senator SESSIONS. All right.

Senator KENNEDY. I welcome this hearing to consider the distinguished nominees for the Federal courts and I also welcome this

sign that the logjam may finally be breaking. Many of us continue to be deeply concerned about the slow pace of Senate action on judicial nominees in this Congress. So far in this session, the Senate

has confirmed only 33 nominees to a Federal bench that now has 76 vacancies. That is only eight fewer vacancies than we started with, in January. So even though we have confirmed more than 30 judges this session, the net benefit to the Federal Judiciary is just eight judges.

Some of my colleagues claim it is the President's fault that he is not sending up nominees fast enough, but he has sent up 40 nominations so far this year and we have confirmed eight of them.

At the rate we are going, we will end this session with the same number of vacancies we started with. That is not fair to the nominees, the Federal judiciary, or the American people. We can and

must do better.

Only a few weeks remain in the session. I hope that we do what we can to act on as many of the pending nominees as possible. As you know, some of them have waited 2 1/2 years for confirmation. Today's hearing is a step in the right direction. We have before us six exceptional nominees, Mr. Hellerstein, Mr. Pauley, Judge Frank, and Judge Berman are accomplished attorneys and jurists. I am confident that they will serve our country with distinction.

I am particularly pleased that two highly qualified women, Marsha Berzon and Colleen McMahon, are on today's agenda. Ms.

Berzon, as others have pointed out, is an outstanding attorney. She has written more than 100 briefs and petitions in the Supreme Court, has argued 4 cases before the Supreme Court, and comes before us today with, a bipartisan list of supporters which includes

our former colleague Jim McClure and Fred Alvarez as the Commissioner of the Equal Employment Opportunity Commission and

Assistant Secretary of Labor under President Reagan.

I hope that Ms. Berzon and Judge McMahon's nominations will move swiftly through the nomination process. Sadly, it is taking the Senate more than three times as long to confirm women and minority judges than other judges. Of the nine nominees pending for more than 1 year, seven are women or minorities. All three of the nominees who have been pending for 2 years or more are women or minorities. By delaying action on so many obviously well-qualified nominees, we do a disservice to the judiciary and to the American people.

Ms. Berzon, Judge McMahon, and Mr. Hellerstein have all been nominated to fill seats in districts declared judicial emergencies by the Judicial Conference of the United States. Empty seats on the Federal courts mean long delays for the citizens seeking protection for their rights. As we all know, justice delayed is justice denied.

I look forward to the testimony of our nominees today and to sending these nominations to the Senate for confirmation as quickly as possible. I thank the chair.

Senator SESSIONS. Thank you, Senator Kennedy.

Senator Specter, do you have any opening remarks?

Senator SPECTER. I do not have an opening statement.

Senator SESSIONS. We do have a problem. I hoped that we could finish by 2 p.m. We are going to have a series of votes stacked at 2 o'clock, which means probably 5, 6, or 7 votes, 45 minutes to 1 hour, so it would be my hope that we could finish by 2 o'clock.

Ms. Berzon, the court of appeals nominee, if you would come forward, we could perhaps begin with you and then we could take the

District Court nominees perhaps individually. I should administer the oath.

If you would raise your right hand, do you swear that the testimony you shall give in this hearing shall be the truth, the whole

truth, and nothing but the truth, so help you, God?

Ms. BERZON. I do.

Senator SESSIONS. Thank you. First of all, I would just like to congratulate all the nominees. This is a panel of extraordinary academic skill and great professional experience. We have no information that indicates any lack of ethical standard or academic ability or temperament or those kinds of things that would raise any questions about the nominees.

Ms. Berzon, I have expressed, and you have probably heard, a concern about the Ninth Circuit Court of Appeals. Recently, the New York Times reported that a majority of the Supreme Court consider the ninth circuit a rogue circuit. They reversed 27 out of 28 cases last year that the Supreme Court reviewed. Do you have any sense that there is a problem with the judicial philosophy of the ninth circuit?

TESTIMONY OF MARSHA L. BERZON, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Ms. BERZON. Senator, I share your concern about the reversal

rate in the ninth circuit. I note that it is better this year than it was last year. And until I am confirmed, if I am fortunate enough to do so, I am somewhat reluctant to make any comments about what might be contributing to the reversal rate.

But I do have some observations as a litigant before this court and many other courts of appeals, and that is that the ninth circuit seems to have fewer internal self-corrective measures than many other circuits do, and I have practiced, for example, before the third circuit, before the seventh circuit, where there seem to be means for panels which think that other panels' opinions are in legal error to, in an expeditious fashion, ask the court as a whole to review those precedents.

On the ninth circuit, whether it is because of the size or the culture or what, it is sort of hard to say, but those self-corrective measures do not happen, and I have some particular experience with this as a contributor to this year's reversal rate in the sense that I reversed a ninth circuit decision in the Supreme Court this year as a litigant, and it was a case which, frankly, had no business being in the Supreme Court. That is, it seems to me it was-while the statute was complex, the legal issue was, I think, fairly clear.

Judge Trott concurred in the ninth circuit, noting that the D.C. Circuit's resolution of the same result was a better one. The Supreme Court was more or less forced to take the case because of

the conflict, took the case, and reversed unanimously 3 weeks after the oral argument. Frankly, there was no reason why that should not have been corrected by the ninth circuit itself.

Senator SESSIONS. And it is an expensive process when you have to go to the Supreme Court to reverse a circuit court opinion.

Ms. BERZON. Extremely, and time consuming for the parties and for the court.

QUESTIONS BY SENATOR SESSIONS

Senator SESSIONS. Based on your experience and observations, do you feel like, for whatever reasons, the ninth circuit has failed to remain sufficiently consistent with the Supreme Court over the years, that that is a valid criticism of the circuit?

Ms. BERZON. I have not done any general survey. I can look at the reversal rates and I can say that they are unusual.

Senator SESSIONS. And it has been a pattern for many years, as I recall, and as a Federal prosecutor throughout the 1980's with regard to criminal law cases, the ninth circuit cases were consistently

cited by defense lawyers when they could not find a case from any other circuit. It was sort of a joke among the U.S. attorneys around the country that the ninth circuit cases were not well respected in their districts.

I say that to you to say that I have indicated under the advise and consent authority or power given this body that I would be giving a heightened scrutiny to the nominees for the ninth circuit, and

I wanted to share that with you.

Let me ask you a few brief questions. I know you have been a member of the ACLU, the American Civil Liberties Union, and were a member of the board of directors from 1985 to 1991 of the northern California branch, and from 1995 to 1997, and vice president, I believe, of that branch from 1989 to 1991. There are a number of lawsuits, some of which I think maybe I can just ask you about in writing, if you have not already responded, that that agency and board filed that I think are not in the

mainstream of legal thought.

First, let me ask you, to what extent did you as a board member or vice president participate in the review of litigation that was filed by the ACLU during that period?

Ms. BERZON. I was never a lawyer for any ACLU case. When I was on the legal committee, and for 2 years, I was chair of the legal committee, and it is for that reason that I was vice president. In other words, there were four vice presidents. In fact, my role was as chair of the legal committee, and that was essentially simply running the meetings of the legal committee. In that capacity, we reviewed cases that were brought to us by the fairly large legal staff of the northern California ACLU. The northern California ACLU is somewhat different from some others in the fact that it has a large legal staff. The clients come to the legal staff. The legal staff determines which cases they want to bring forward. They bring those cases to the legal committee essentially to determine whether there are colorable legal theories. It is a consultation role of simply outside lawyers who meet once a month, 10 or 11 months a year, for this purpose, for 1 hour or so. The board only votes on litigation if there is a dispute in the legal committee or if someone specifically asks that there be a vote. So otherwise, there is a report of the legal committee to the board, but there is no vote.

Senator SESSIONS. During this period, do you recall any cases, litigation filings, in which you either opposed the filing or did not agree with the position taken by the ACLU?

Ms. BERZON. I can think more clearly more generally. That is, there are two instances in which I have, on behalf of clients, represented interests that were directly opposed to the ACLU's position in the same case.

One was in a Hawaii case in which the Hawaii ACLU was challenging Good Friday as a holiday under the establishment clause,

and I represented parties supporting the statute in the U.S. Supreme Court in opposing certiorari.

The second occasion was when there was a case in the U.S. Supreme Court-

Senator SESSIONS. You were retained on that?

Ms. BERZON. I was retained in both of these instances, that is right. There was a case in the U.S. Supreme Court concerning abortion protests, or protests in front of abortion clinics in which the ACLU took a position that I regarded as insufficiently protective of the first amendment and my clients did, as well, and that

is an instance in which I feel, although I was retained, I feel quite strongly that the ACLU's position was insufficiently supportive of the first amendment.

Senator SESSIONS. Are any of those while you were on the board that were filed that you specifically recall?

Ms. BERZON. Probably both. I am not sure about that, but probably both.

Senator SESSIONS. Both-

Ms. BERZON. I think both of those were instances while I was on the ACLU board, but I would have to check that. I am not sure of the dates.

Senator SESSIONS. All right. Senator Feinstein.

QUESTIONING BY SENATOR FEINSTEIN

Senator FEINSTEIN. If I may, Mr. Chairman, do you, Ms. Berzon, feel in any way bound by positions the ACLU has taken?

Ms. BERZON. I absolutely do not. Moreover, if I am confirmed as

a judge, not only will the ACLU's positions be irrelevant but the positions of my former clients and, indeed, my own positions on any policy matters will be quite irrelevant and I will be required to and I commit to look at the statutes, the constitutional provisions, and the precedents only in deciding the case.

Senator FEINSTEIN. I would like to clear the record on one other thing, if I might. Ms. Berzon, among your pro bono cases, you successfully appealed the death sentence of an inmate. In that case,

I understand that the California Supreme Court agreed that the defendant had been unconstitutionally denied counsel with regard to a prior conviction, and as a result, the California Supreme Court reversed the death penalty but left the underlying conviction standing.

If your nomination is confirmed, you will, no doubt, face death penalty cases on the ninth circuit. In the last Congress, the number of Federal death penalty acts was increased from approximately a half-dozen to over 50. I would like to ask you, and perhaps you could answer, do you feel the Constitution permits the imposition of a death penalty sentence and would you be willing to fully implement a death penalty sentence?

Ms. BERZON. Senator Feinstein, the Supreme Court has held that the death penalty does not violate the eighth amendment to the U.S. Constitution and I would have absolutely no problem following that precedent.

Senator FEINSTEIN. Thank you very much.

That completes my questions, Mr. Chairman.

Senator SESSIONS. All right. Senator Specter.

QUESTIONING BY SENATOR SPECTER

Senator SPECTER. Thank you very much, Mr. Chairman.

Ms. Berzon, there is a lot of discussion about jurists legislating as opposed to interpreting the law. How would you articulate assurances for this committee and the Senate that you will not legislate but will interpret the law?

Ms. BERZON. I am, of course, quite aware of the proper role of the Federal judiciary. I think in my legal career that I have taken great pains to stress that role and to give courts an opportunity to decide cases as narrowly as possible by sharpening the issues and telling them quite clearly what is before them and what they really need to decide.

I, as a judge, would, of course, refrain from any legislation-like activity, from any pronouncements of broad social policy, and, indeed, in one of the writings that I submitted to this committee,

which I wrote to a nonlegal audience, I took some effort to explain to that audience what the role of the judiciary was and why it was that judges do not pronounce broad social policy.

Senator SPECTER. Senator Sessions has referred to the high reversal rate in the Court of Appeals for the Ninth Circuit. Like you,

I have not surveyed the cases. I do not know if they are reversed because of flying in the face of precedents or because of on matters of first impression they were wide of what the Supreme Court thought ought to be done.

What assurances can you give the committee and the full Senate about your activities to try to do something about that high reversal rate?

Ms. BERZON. I can only say that it has been a point of pride in my legal career that I read statutes carefully, that I am attentive to language, that I read precedents carefully, and that I take a traditional and narrow view of the role of the courts. As I said, I am

somewhat interested in judicial administration issues and whether there is anything about the precise way in which the ninth circuit operates that contributes to this reversal rate and I will be quite attentive to that problem, as well, if I am confirmed.

Senator SPECTER. I will not ask you if you will follow Supreme Court decisions because you have already stated your view there, but when confronted with constitutional issues, matters of first impression, what can you tell us about the guidelines that you will use where there is no binding precedent by the Supreme Court?

Ms. BERZON. In deciding a constitutional case, I would, of course, begin with an extremely strong presumption that any statute that is involved is constitutional, if that is the kind of constitutional issue that we had before us. I would read the words of the Constitution very carefully, just as I read words of statutes very carefully. I would look to other circuits if there were no precedents in our circuit, and I understand that that was your question, to see how other circuits have handled the matter. And then I would look to analogous cases, similar issues, either in my circuit or in other circuits or in the Supreme Court.

Senator SPECTER. There has been some comment about your being hostile to ballot initiatives. You have represented a number of clients who have challenged the legality of ballot initiatives. Are you hostile to ballot initiatives or were you an advocate of trying to achieve a result within the confines of the law?

Ms. BERZON. Well, first of all, I am a Californian. Californians vote on a lot of ballot initiatives. We like to vote on ballot initiatives, and generally, I think it is a good process.

Senator SPECTER. Why do you so like ballot initiatives?

Senator FEINSTEIN. That is a long story.

[Laughter.]

Ms. BERZON. It is a long historical story, but it does make the populous in general think about matters of public policy that they might not otherwise do.

I was, on one occasion, represented the parties, and in another an amicus curiae, on cases in which the challenge to the ballot initiative in both instances was strictly procedural. In other words,

the question was whether this was a proper initiative. That is all.

There were not substantive attacks on the initiative.

Senator SPECTER. Aside from the one case which Senator Feinstein asked you about involving the death penalty, have you had

any other experience as a lawyer with the death penalty?

Ms. BERZON. No, I have not. Well, no, I have not. I was going to say something about clerkships, but, in fact, in my clerkships, we did not have any death penalty issues.

Senator SPECTER. This may be a little broad, but I would be interested in your answer if you care to answer. Do you have any

conscientious scruple against the death penalty?

Ms. BERZON. I would, of course, enforce the law as written. My personal views are of no matter and I would have no problem at all enforcing the death penalty.

Senator SPECTER. OK. I will take that as a declination and a statement that you will uphold the law. You have a very distinguished record, Ms. Berzon, with your clerkship with the court of

appeals and with Justice Brennan and your academic record.

Those conclude my questions. Thank you, Mr. Chairman.

Senator SESSIONS. Thank you. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

I am interested, you have appeared before the Supreme Court four different times. That is rather unique. What do you draw from that? Did you reach any lessons from that sort of experience? What could you share with us in terms of that aspect of your own professional kind of development?

Ms. BERZON. Yes. The main lesson is that on every occasion, I have prepared as carefully as I possibly know how. I have known my case inside out and backward. I have consulted with a great many people and the Supreme Court always understood something about that case that I did not. They are remarkable people. They do an amazing job and it has always been a wonderful experience to appear before them.

Senator KENNEDY. It is really an extraordinary background, both the practice there and the variety of your own kind of practice. You specialized in the area of law, did you not, and spent a good deal of time in terms of labor law?

Ms. BERZON. I have spent a great deal of time doing labor law in a very broad sense, that is labor management law, as well as employment discrimination law, as well as a wide variety of other issues that may affect labor and employees but are not traditionally called labor law as such.

Senator KENNEDY. I find that it is a remarkable background and experience you have. I think you are enormously well qualified to serve on the court and I look forward to voting in your favor.

Ms. BERZON. Thank you, Senator.

Senator KENNEDY. Thank you, Mr. Chairman.

Senator SESSIONS. Ms. Berzon, I did have some questions I would like to pursue with you and just discuss it lawyer to lawyer, so to speak, and get some insight into your thinking on a number of important issues, but we do have these other nominees. I would think

that we would be out of there within the hour and be able to come back. Would you be able to stay?

Ms. BERZON. Certainly, I would. What time would you like me to be here?

Senator SESSIONS. I would say we would not be back sooner than a quarter until. Let me just suggest this. If you would allow us to do these other nominees now, maybe we will have time before we are called over there, but I doubt it.

Ms. BERZON. OK.

Senator SESSIONS. I understand there is a room over there next to the chambers that we might utilize and it has been suggested we could utilize. So maybe if we could do these other nominees, we could take care of that right now, as soon as we finish.

Ms. BERZON. Thank you very much, Senator Sessions.

Senator SESSIONS. Thank you.

Senator FEINSTEIN. No. Mr. Chairman, is it the Vice President's room where we will be meeting to continue with Ms. Berzon?

Senator SESSIONS. Yes, and I will ask the staff people if they will meet with Mr. Berzon and help her find her way there. It is room 219. It is off the Senate Chamber, and hopefully, we will be able to finish up before too long on that subject. It is open to the public, of course, but we would look forward to continuing that.

Senator SESSIONS. Ms. Berzon, I understand you had some other family members that you did not get to introduce. Would you honor us with that?

Ms. BERZON. I think that everyone was introduced that was here, my father, my sister, my other sister, my brother, my nephew, my children, my husband, and my partner, Fred Altshuler, was also here from California, and I also wanted to mention that my mother, Sylvia Siegel, is home in New York. She could not join us because of her health, but she wishes that she could, and my mother-in-law, Ethel Spitzten, is home in Florida, also unable to come.

I would also like to take this chance to thank you for holding this hearing, which I did not have a chance to do before.

Senator SESSIONS. I am glad we are making some progress. I am a little reluctant to start before Senator Feinstein gets here. I told her we would wait for her. I think she wanted to vote on this next vote and then come on over.

[Recess.]

QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. I wanted to ask a few questions about some issues I think are important. While you were on the board of directors of the ACLU of Northern California, that group filed a lawsuit

challenging proposition 209, the California civil rights initiative.

Did you agree with that filing, and in particular, do you believe proposition 209 is unconstitutional?

Ms. BERZON. Again, I was not the lawyer in the case, but I think you understand that. I believe that proposition 209 was held constitutional, of course, by the ninth circuit, and I have read that

opinion and I think it is a well-written opinion.

On the other hand, what the ACLU was doing, of course, was bringing a challenge, and the real question, at least to me as a board member was, was it a colorable challenge. It seemed to me that there was sufficient confusion in the authority, the one line of cases being the Adarand and Croson line of cases, which made clear that there is the strictest of scrutiny with regard to affirmative action policies, and on the other hand, these older decisions in

the ninth circuit with regard to procedural equal protection or of political process equal protection.

I, myself, have found the ninth circuit opinion well-reasoned and would have absolutely no problem applying it.

Senator SESSIONS. I know they concluded, "There is no doubt that proposition 209 was constitutional," and, in fact, it seems to me that it is perfectly harmonious with the Constitution. Wherein would you find that it would be unconstitutional? What colorable argument would you make?

Ms. BERZON. I can explain the argument. I did not make the argument, and as I say, I have no quarrel at all with the ninth circuit's conclusion on the subject.

Senator SESSIONS. Did you have occasion to vote on whether or not to file the lawsuit?

Ms. BERZON. I do not recall doing so. I probably could check that, but my attendance at those board and Legal Committee meetings—first, I think it was before I was on the Legal Committee, and my attendance on those board meetings was not terrific and I do not remember voting on it.

Senator SESSIONS. California is sort of this confrontation with the people's right to express their political desires and conflict with a lifetime appointed, unelected, unanswerable, really, Federal judge with the power to eliminate that with the stroke of a pen.

Did you feel any hesitation about filing a lawsuit?

Ms. BERZON. I, as I said, did not file that lawsuit. I was not a lawyer on that lawsuit and I do not recollect that I had any role at all in filing that lawsuit, and I would be happy to check that, but-

Senator SESSIONS. Was that during the period you were vice president?

Ms. BERZON. No, it was not.

Senator SESSIONS. It was not.

Ms. BERZON. And I was not on the Legal Committee at the time, either.

Senator SESSIONS. The lawsuit alleged that America's core principles of equality under the law "are deeply degraded by Proposition 209." Do you agree with that?

Ms. BERZON. I have never seen those pleadings. I have not read them. I do not agree with the statement as I heard you make it, but I certainly-again, to go back to the role, I never would have seen those pleadings and I did not see the pleadings.

Senator SESSIONS. Proposition 209 said the State shall not discriminate against or grant preferential treatment to any individual

or group on the basis of race, sex, color, ethnicity, or national origin. Do you see how anything in that could degrade, deeply degrade, America's principles of equality?

Ms. BERZON. The Supreme Court, as I say, has held quite firmly in Adarand and in Croson that as a statement of constitutional law, that appears to be an accurate statement. For that reason, the only colorable issue, it seemed to me, was whether the older cases, Seattle and so on, set up a different standard when you had different roles of government. Frankly, it is an argument that I do not

know very well, I have not thought about very hard, and is not an area of the law that I have worked in very long.

Substantively, I think that it is clear that the statement is consistent with Adarand and with Croson. The issue that was the interesting one and that had some measure of, at least, reconciliation of different lines of authority was the procedural process one, the one that was in the Supreme Court a few years ago in Romer v. Evans, the issue that was analogous to that.

Senator SESSIONS. Would you share any thoughts you might have about equality of opportunity and access with equality of results?

Ms. BERZON. Could you explain that a little more?

Senator SESSIONS. Well, some seem to believe that a lack of equality in results is per se proof of a lack of equality in opportunity. Would you have any thoughts about that comment? The attack on proposition 209, I think, reflects that, to a degree. It is a suggestion that equality of opportunity is not enough.

Ms. BERZON. The Federal courts have made quite clear that that is not the case. In narrow circumstances, there may be-the statistics may be of some relevance in a title VII case, for example, but

certainly, they are-the fact that there is an outcome that does not show the statistical division of people, a relevant group, is no proof that there has been constitutional discrimination. Indeed, the Court has made clear many years ago that that is the case.

Senator SESSIONS. All right. Let me ask a question with regard to proposition 227, the one that was passed last month in California to end bilingual education in the public schools. Proponents of

227 argue that bilingual education harms immigrant children by discouraging them from learning English. A day after proposition 227 was passed, your ACLU chapter filed a class action lawsuit in Federal court challenging 227, arguing that proposition 227 is unconstitutional and violates the Civil Rights Act of

1964. Do you agree with that lawsuit?

Ms. BERZON. First of all, I was not on the board any longer at that time. Second of all, I do not know the issues in that lawsuit. I know that the proposition involves difficult educational questions.

I know that if I were a judge and I was considering the constitutionality of a proposition such as that, I would go to it with an extremely strong presumption that it is valid, as for any other law, and I would carefully read the precedents in the law. In this particular incidence, I do not really know the precedents on which this

case was based, and as I said, I was not on the board at that point.

Senator SESSIONS. I think most of us do not tend to know all of these constitutional issues, and I certainly do not expect you to cite the case authorities and all of that, but when you are active in an organization that is filing lawsuits, I think it is fair to inquire whether you affirm that view, are indifferent to it, or oppose it. Are you a believer, a nonbeliever, or an agnostic on that lawsuit?

Ms. BERZON. On which? I am sorry.

Senator SESSIONS. On that lawsuit, the proposition 227 lawsuit.

Ms. BERZON. I really know literally nothing about the legal issues in that case, and as I said, I was not on the board at that time. I can say as a policy matter that I thought it was a close question because, on the one hand, the concern for children learning English is a real one. But on the other hand, I was disturbed

about making curriculum laws for the whole State of California. So as a policy matter, that is one issue. But the constitutional issues are, of course, entirely separate and I really in this instance have virtually no understanding of what they are and I was not on the board at the time.

Senator SESSIONS. That whole issue concerns me. I guess the question is, does the Constitution require a State to offer bilingual education and to how many different language groups must it do so?

Ms. BERZON. I-

Senator SESSIONS. Now, I understand, I will admit to you, here is a legitimate public policy, the education issue, the social issue, that the legislature and the school board must address. I want to focus on the Constitutional issue. Activist judges and people who advocate certain policy and social positions somehow find a way to have the Constitution interpreted to implement their agenda.

Ms. BERZON. I-I am sorry.

Senator SESSIONS. Would you discuss that with me, because that is the concern.

Ms. BERZON. I understand the concern and I understand that it is sometimes difficult to look into other people's mindsets and the way they operate to know what they are going to do when they become judges. I guess what I can offer to you is my own firm belief

and knowledge of the way that I think, but more than that, I would hope that you would read carefully the letters that were submitted on my behalf because they were, as Senator Feinstein and others noted, by opponents and, very gratifyingly to me, by many, many prominent members of the management bar, even though I have largely represented the employees of unions and employees. One of those letters, from Fred Alvarez, who was an Assistant Secretary of Labor in the Reagan administration, said that I was virtually

the only union lawyer for whom he would have taken this support. It is a fact that I have, in some sense, succeeded in what I have tried to do in my legal career, that is, to litigate on the facts and on the law and making my best effort to clarify for the courts and for the litigants what the issues are and provide as much information to deciding the question as they can while representing my clients is the best evidence that I can give.

Senator SESSIONS. I probably want to do some more, but please.

QUESTIONING BY SENATOR FEINSTEIN

Senator FEINSTEIN. If I may, let me, first of all, as a Californian for over 60 years and as a Democratic candidate for governor of the State and a mayor and a public official in the State for better than a quarter of a century, I want to just put something on the record about Californians and initiatives.

There are a number of reasons why Californians bring initiatives to bear, many times, out of frustration with the legislative body, as well as other reasons. Very often, they are not legally carefully thought out. So initiatives will be challenged in the future. For example, there is one coming up for the November ballot that I believe will be challenged constitutionally based on the way it is drawn.

So I do not think that a constitutional challenge brought by anybody, we would regard in California as anything really unusual,

and I would just say that for the record.

Ms. Berzon, let me ask you this question. Did you have any involvement with proposition 209?

Ms. BERZON. I had no role at all in the litigation whatever.

Senator FEINSTEIN. Now, let me go to something that one circuit judge has said about ignorance of the people and talk about a case called Bennett v. Yoshina, which was a ninth circuit case in 1998. I believe you had something to do with that case?

Ms. BERZON. Yes, I did. I was-

Senator FEINSTEIN. Would you tell us the circumstances of it and what the finding of the court was and who you represented?

Ms. BERZON. I represented the Hawaii State Federation of Labor and 40 or so voters on a constitutional convention ballot that was held in Hawaii a year or two earlier. There was a question under the Hawaii Constitution as to how the ballots should be counted in that case and there was a Hawaii Supreme Court case in which I participated as essentially advisory attorney to the lawyers in the case concerning that issue, and the Hawaii Supreme Court concluded that the constitutional convention was not to be held under

the-because it had failed to get the requisite number of votes.

At that point, a group of proponents of the constitutional convention brought a suit in Federal court claiming that because it had

not been clear before the election how the votes were going to be counted, there was a failure of due process and the whole election had to either be held again or there had to be a ratification of the conclusion that the constitutional convention had, in fact, passed, and a three-member panel of the ninth circuit, Judges Wiggins, Newman, and Tashima, held that that was not the case and that there was no failure of due process. So those are the circumstances.

Senator FEINSTEIN. Thank you very much.

Ms. BERZON. I guess the interesting thing about that case is that the issue in it was whether there was any due process-

Senator FEINSTEIN. So, in other words, your representation sustained the initiative.

Ms. BERZON. Sustained the Hawaii Supreme Court's conclusion

about who had won the initiative.

Senator FEINSTEIN. Right. You earlier stated that you also are concerned about the reversal rate on the ninth circuit, and you mentioned a little bit about this correction committee. Do you have any thoughts on how you would see or the kind of judge you might be in terms of being able to reverse this, in addition to the correction committee?

Ms. BERZON. Do you mean, if I understand the question, if I were a judge, would I take an active role in the administrative issues?

Senator FEINSTEIN. You said it better than I did, in my unartful way.

Ms. BERZON. I thought you said it very well, but I wanted to make sure I was answering the right question. Yes, as I said, I was a law clerk in the ninth circuit. I appeared before the ninth circuit. I was also a law clerk in the supreme court. Those were two very different institutions. I do have thoughts and interests in the way that courts operate internally-and a belief that the kinds of mechanisms one sets up have a real effect on the outcome and how the litigants feel about whether justice has been done.

I might mention that one of my mentors in this regard was Judge Alvin Rubin, who was on the fifth circuit at one time and for whom my husband was a law clerk. He spent a lot of time thinking about these issues and we would talk about them. I was sad when I was nominated to know that he had died a few years ago and would not be around to offer me advice, but I noted that the Federal Judicial Center seemed to think as highly of his advice as I do and the tape that I will watch if I am nominated will be Judge Rubin telling me how to be a good ninth circuit judge. But they are issues I am interested in and I do think they matter.

Senator FEINSTEIN. What would you do?

Ms. BERZON. As I start-well, first of all, the ninth circuit has recently started a mediation project. I have been very active in alternative dispute resolution for the Northern District of California.

I have been an early neutral evaluator and a mediator and I am a great believer in those processes. I do not know too much about how the mediation process on the ninth circuit is working out, and it is somewhat unusual to have mediation at a court of appeals level as opposed to at a district court level.

Before the mediators were there, I remember sitting through a few oral arguments in which the judges were essentially promoting negotiations from the bench and I think they became frustrated with that and, therefore, decided to find a staff, so there is now a staff and I would certainly want to work with that staff and with questions about whether it is possible through alternative dispute resolution mechanisms at the court of appeals level to do some serious expedition of the litigation.

Additionally, there are the kinds of questions that I was alluding to before. It seems to me that there are self-corrective mechanisms that other circuits have in place, such as circulating to the court as a whole proposed opinions that might in some way infringe on earlier precedents where the panel feels strongly that those precedents are incorrect or undermined by later supreme court opinions

and inviting any judges who want to call for an en banc instead to do so.

The ninth circuit, to my knowledge, has never had such a policy, and the result is a kind of a wiggly law where the-which is very

hard to provide guidance to litigants because the second panel thinks that the first panel's result has to be followed but is really a little foolish, so they wiggle around it in a way, or even foolish in a major way.

As I said before, my recent experience with this bay area pension fund case is a good example. That is a case that was not a big issue and it was enormously expensive, as Senator Sessions mentioned before, for the parties to straighten out a mistake that really mattered but did not deserve the supreme court's attention.

Senator FEINSTEIN. I think you stated that you felt that proposition 209 was really consistent with the City of Richmond and

Adarand. Would you find yourself with any difficulty in enforcing those laws as litigated by the supreme court?

Ms. BERZON. I would have no difficulty applying those precedents. I understand that the court has said that affirmative action

policies are to be upheld only in the narrowest--only in narrow circumstances, at least, circumstances--I am sorry.

Senator FEINSTEIN. Yes, if you would go into that strict scrutiny doctrine a little bit, too, please.

Ms. BERZON. Yes. The strict scrutiny doctrine, as I understand it, has two pieces. The first is that the need has to be compelling.

That means not a strong reason or a significant reason but a compelling reason. The supreme court has not had occasion since

Adarand to explicate further exactly what--which interests reach that. The only one so far that has been indicated at all is severe past discrimination, and whether there were any others was an issue that the court granted certiorari on the Piscataway case this past year, but that case was later settled and, therefore, the court is not available--is not deciding that question right now.

The second piece of the strict scrutiny standard is that any such policy has to be narrowly tailored, and that, again, has not been explicated further by the court since Adarand. There are some indications that it may include things like time limits or other efforts

to make the policy limited.

So there are certainly open and serious issues of law, and, indeed, ones that may well come before the court, and I think it

would be inappropriate, really, to go into it much further.

Senator FEINSTEIN. Let us say we took a snapshot of you, say, 5 years into your tenure as a circuit court judge. How would you like to be looked at and regarded? What would you hope your accomplishments will have been?

Ms. BERZON. I would like to be regarded as someone who works extremely hard to gather all of the appropriate legal materials, who listens really hard to the litigants, and in the case of the court of appeals, sometimes that means reading hard because there is not that much talking that goes on, and gives credence to the arguments on both sides and thinks about them hard and then comes

to the best possible solution that I can about where the statutes, the precedents, the constitutional language, lead us with regard to the result.

And also, in a vein that we were discussing earlier, I would like to be known as someone who participates in the life of the circuit. It is, after all, a collegial corps who works well with the upper judges, who is not adamant, who has some humility about my own views and a real willingness to listen, and I must say that this is an area in which I do have a fair amount of confidence that I will

be able to fulfill my goals because I have a habit of opening up the opposing brief in every case, and if it is at all well done, reading it and saying, they have to be right. I do not see how I could possibly be right. I think that that is the kind of frame of mind that I want to bring to the court.

Senator FEINSTEIN. How do you feel about the en banc sitting of the court, which in the ninth circuit is a little different from the other circuits?

Ms. BERZON. I, as I said before, really hesitate to get too far into that kind of issue unless I am, in fact, confirmed and confer with other members of the court. I know that this court is one that has shied away from having en bancs and I fully understand why.

What I am curious about is whether there are any other mechanisms that could be set up to deal with questions of where there

would actually be a major consensus that things have taken a wrong turn, but procedurally, it is difficult to get to that consensus.

Senator FEINSTEIN. I want to ask you one last question, and this is on the question of habeas. I think there has been a lot of real concern in the citizenry at large, and I am not a lawyer, so I am not asking this from a lawyer's perspective, but the habeas proceedings are so very lengthy. You had cases like Robert Alton Harris, a terrible murder case, a death penalty case where the habeas situation went on for 12, 13 years, 14 years, both State and Federal. In the last session of the Congress, we corrected that so that

the habeas, the Federal habeas portion is very much truncated.

How do you feel about that?

Ms. BERZON. I should say, first, that my criminal experience is somewhat limited, and I certainly would intend when I-if I am confirmed, to spend a lot of time on a learning curve to learn more about criminal law than I know now.

In general, of course, I think that delays are to be avoided and that anything that can be done to accomplish that end consistently with the Constitution is an appropriate legislative task and one that I would uphold, applying the same constitutionality standards that I articulated earlier.

Senator FEINSTEIN. And I am going to say this. In California, many of us, and I am one of them, feel that, in many respects, the courts sometimes stand as a block to justice being carried out, and that it is one thing to have an appellate process, but there has to be a reasonable process and it has to be reasoned in the term of time. I think when you get over 10 years, nobody thinks it is either of the above. I think anything that you could say to this committee in that regard of how you would view this would be useful.

Ms. BERZON. As you noted, I did do one death penalty appeal, which I was specially asked to do by the California Supreme Court organization that was recruiting lawyers. They were recruiting lawyers because they did not have enough lawyers and they

came to me as a civil appellant lawyer and asked me as a public service to do that case, and at a considerable sacrifice, I did so, or actually, my law firm did so. I did a part of it and one of my partners had principal responsibility.

That case took a long time, but if one looked into the record of why it took a long time, and these are the kinds of things that are sometimes buried below the surface, we had a terrible problem getting the transcript certified. We wrote letters- because there was

an earlier conviction in Chicago, we had an unofficial transcript

from Chicago. We offered it right at the outset and said, put this in the record and let us go forward, and the court insisted that they had to get the official transcript from Chicago 15 or 20 years ago and that took years. We kept writing letters, saying why are we doing this, but that is where it was. In that instance, the reason for the delay was one that one does not necessarily think of and was not attributable to the litigants at all.

Senator FEINSTEIN. Thank you. Thank you, Mr. Chairman.

Senator SESSIONS. Senator Specter.

QUESTIONING BY SENATOR SPECTER

Senator SPECTER. Ms. Berzon, I think the critical question you have answered, that you would be prepared to follow Adarand or whatever supreme court decision was involved. It is not unusual on the most highly contested cases for opinions to be written saying there is no doubt, et cetera, about whoever is writing the opinion, or for very strong language to be used, like degrading. Stronger language is even sometimes used on the floor of the Senate, although not lately, from the delays in the last vote that went on and on.

I think it would be useful if you took a look at the statute which limits appeals--there has already been one interpretation by the supreme court--and respond in writing whether you have any problem upholding the statute which puts a time limit on it.

With respect to these California procedures, it would not be beyond my expectation to see the lawyers challenge them. Thank you.

Ms. BERZON. Was that a question?

Senator SPECTER. I do not think there is a question.

Ms. BERZON. Thank you. Thank you, Senator.

Senator SESSIONS. Well, I guess the problem is, and our concern is, and what I have said publicly is that I am not voting to, not that it makes any difference what I do with 99 others around here, but my own personal view is that I am not going to vote for a person for the ninth circuit that I do not think is going to improve that

circuit and bring it closer to the mainstream of American law.

Some might say that the ninth circuit is not out of it, but I think it is. I have seen the circuits opinions over the 15 to 20 years when I was a prosecutor. I believe the circuit has somehow, some way, gotten out of the mainstream and I want to be fair to you and ask you some questions in that regard.

Let us take the death penalty cases. I understand that the ninth circuit uses about half of the total Federal funds for death penalty appeals. This is attributed to so many hearings and so many appeals and other matters that the judge approves. But at any rate,

half of the moneys allocated for death penalty appeals in the entire United States are going to the ninth circuit. Have you heard that and if you have, does that cause you any pause?

Ms. BERZON. I really do not--it is not an issue that I am familiar with, the expenditure on--I assume you meant habeas corpus, and I am just really not familiar with it.

Senator SESSIONS. My basic view is that the circuit encourages too much death penalty litigation. The State has a supreme court and an appellate court system and a trial court system, and O.J. Simpson gets acquitted by a jury and that is it. He cannot be tried again. With regard to being convicted, you have got your appeals and maybe one appeal in Federal court, for which some reform has

been done. But some people, particularly when a death penalty case is involved, are just obsessive as to every possibility on a possibility on a possibility needs to be litigated and the taxpayers

should pay an attorney to litigate it for the defendant and pay an attorney to defend the verdict and decades go by. Are you concerned about that at all?

Ms. BERZON. Senator, I well understand that the Senate has an enormous concern about that and has passed a statute, or perhaps more than one, that is intended to deal with that. In addressing any application of that statute, I would certainly read every title of it extremely carefully and apply it, again, unless this quite high standard for a constitutional challenge is met. I do not know whether there will be further constitutional challenges in the ninth circuit. I believe there have been some.

If I were confirmed and approached with any of those, or faced with any of those challenges, I would approach the constitutional issues as I articulated earlier I would approach constitutional issues in general, that is, with a strong, strong presumption of constitutionality and a very careful consideration of any arguments about constitutionality.

Senator SESSIONS. I guess I am thinking more of the routine death penalty appeals and how they are handled. I think it has a tendency to undermine respect for law, undermine public confidence in the court system. When I was attorney general in Alabama, it was 12, 14 years routinely if somebody ever got executed, and usually the appeals had long since ceased to focus on guilt or innocence but on the composition of the jury or evidentiary ruling or something of that nature.

I just feel like that we have got to have the ninth circuit get back into the mainstream and recognize the legitimate concerns of guilt and innocence and having fair trial but not allow the system to be virtually destroyed in a multiplicity of appeals, particularly in the death cases. Do you share any concern like that, just from your observations?

Ms. BERZON. My sole observation in a criminal appeal is the one that I articulated earlier, the single death penalty case that I have done. In that case, we did obtain a reversal of the death penalty, but not of the underlying conviction, from the current California Supreme Court in 1996. Those reversals are quite rare, but I thought we got a fair hearing and they were able, in a case in which there was a seriously unconstitutional prior conviction from Illinois many years ago, to perceive that that was the case.

Senator SESSIONS. So they got the conviction reversed?

Ms. BERZON. No, not the conviction, the death penalty.

Senator SESSIONS. The death penalty?

Ms. BERZON. Because the death penalty was based on a-it was only valid because of a prior conviction of many years before.

Senator SESSIONS. That was a big gimmick. A lot of them have-never mind. You should use every tool when you are defending a

client that you could, but that is typical, to me, where you have got a legitimate conviction that perhaps there was not a lawyer, some defect in it, and it comes up and it can be used in another prosecution.

Ms. BERZON. I think my point was that I thought we got a completely fair hearing from the California courts, that they ultimately

did a good job with it, and at least in that instance, while I believe there was a habeas pending on the underlying conviction, which one of my partners was handling, the California Supreme Court

dealt with the case and gave it a great deal of careful attention.

Senator SESSIONS. Let me ask this. You clerked for Justice Brennan, who certainly was one of the most able members of the Supreme Court. It is a high honor, to be selected to clerk for the Supreme Court of the United States.

Justice Brennan adhered to the

belief that the death penalty was unconstitutional. He and Justice

Marshall and, I think, some other Justices before them that adhered to the view that the death penalty was unconstitutional and

dissented in every death penalty case. Had Justice Brennan, taken his position on the death penalty when you clerked for him?

Ms. BERZON. I think he had, but there were no death penalty cases decided the year that I clerked for him.

Senator SESSIONS. Do you agree with that position?

Ms. BERZON. The Supreme Court has definitively held that there

is no unconstitutionality of the death penalty, and as a ninth circuit judge, I would, of course, apply that precedent.

Senator SESSIONS. But I want to ask you on that question, did

you agree with Justice Brennan that the death penalty was unconstitutional as being cruel and unusual punishment?

Ms. BERZON. I, in fact, had no opportunity to agree or disagree

with him, first of all, because I was his law clerk, I was not the

Justice, and second of all, because the issue did not come before the

Court the year that I was there. And again, it is not in the area

of my expertise. I have-I understand the competing considerations, that is, that the Constitution has many provisions which

seem to contemplate the death penalty and Justice Brennan and

others articulated a belief, however, that there were some indications to the contrary.

Death penalty law, except for this one case I did, is not a specialty. I did not raise the constitutionality issue in the case that we

did, and that really-the best assurance I can give you is that I

would have no problem applying the law as it exists.

Senator SESSIONS. I guess since circuit judges, more than initial

judges, rule on cases that never are reviewed beyond them, and

they have to make constitutional decisions, I guess I am trying to

understand your method of thinking about the Constitution. Since

there are about four, or I think it is six or more references to capital crimes, taking a life, only with due process, in the Constitution,

are you able to say one way or the other that you personally believe that the death penalty is or is not cruel or unusual punishment?

Ms. BERZON. I have a tendency to regard textual evidence of that

kind extremely highly, both with regard to the Constitution and

with regard to statutes and to take it extremely seriously. It is

hard to predict oneself how one is going to decide as a judge and

I would suppose that I would be extremely attentive to those kinds

of evidence. It would really be inappropriate for me to go any further, except to say that if the precedent remains what it is, I will

apply it. If the precedent changes, I will apply that.

Senator SESSIONS. Well, that one, to me, is a real issue. I suppose we can have differences of opinion, but I think it sort of represents the high water mark of judicial activism, that opinion. It

was an opinion that basically said, we have evolved and standards

of decency have changed and now we believe the death penalty is

cruel and unusual when perhaps the Founding Fathers did not.

But I think that is a very dangerous philosophy for a judge. I

think that when you get to the point where you have multiple references within the document itself to the legality of the death penalty, to say that one clause in it, by reinterpreting its traditional

meaning, invitiates those other clauses is not a close question. So

in that regard, to me, that is a pretty pivotal opinion.

Did you want to comment? I will not ask you too many more.

Ms. BERZON. No. I mean, I absolutely see the force of your argument. It is not particularly relevant right now since the issue has

been decided by the Court, and again, it would not be my role as a court of appeals judge for me to determine that question and I have no intention of doing so.

Senator SESSIONS. I wish you could say you agree with me.

Ms. BERZON. I hesitate, primarily because I do not like to say what I agree with and what I do not agree with when I have not thought about it-

Senator SESSIONS. I can understand.

Ms. BERZON. [continuing] As a legal matter.

Senator SESSIONS. I think you have answered Senator Feinstein that you would enforce the law. I think the real problem with the

death penalty is that some judges in their hearts are really systematically, I think, trying to block it, but very, very, very few. I think

most judges, if anything, are just too reluctant to carry out the settled will of the State where a death penalty has been imposed and

allow too many discretionary decisions which prolongs these cases too long.

Do you have anything else?

Senator FEINSTEIN. No. I think I have asked my questions.

Thank you.

Senator SESSIONS. Senator Specter.

Senator SPECTER. A comment or two here, Ms. Berzon. When you talk about valid prior convictions, the cases are all over the lot and you have got to have due process and proper representation. We

are relying a tremendous amount on prior convictions now with career criminals, a great many statutes which rely on prior convictions, so that is hornbook law, to see to it that the prior conviction

is constitutionally obtained. I am looking forward to Senator Sessions' close questioning of you when you are nominated for the Supreme Court. [Laughter.]

I think we will not get an answer because the nominees to the Supreme Court do not give answers to questions on the ground that the case is-going to come before them. They answer as many questions as they feel they have to for confirmation.

I asked you the question this morning in the context of conscientious scruples. That is a question which is asked of jurors. You

chose not to answer it and I did not press you on it. I think Justice Brennan was wrong in his interpretation. I happen to agree with Senator Sessions about the death penalty and intent, and even under Cardoza, we have not come to the point in my judgment.

But I would expect you to apply the law, as you said, and Strom and Senator Sessions and I will question you very closely when you come before us for the Supreme Court.

Senator SESSIONS. The ninth circuit is just one step from the Supreme Court. [Laughter.]

I will not pursue the question of the Prison Litigation Reform Act, which was struck down and ruled unconstitutional by the ninth circuit. I think they are the only one of about six circuits that have considered it who have done so.

Let me just ask these questions, and I will finish, and I just do it for the record. You have been a longtime member of the ACLU and they adhere to a number of positions, one of which is that they believe the death penalty is unconstitutional, I believe. Certainly,

they oppose the death penalty. Do you know precisely what their position is on the death penalty?

Ms. BERZON. I do not know whether they continue to take the position that the death penalty is unconstitutional. As I said, that position on that issue as a general matter is really not a relevant one at this point. That issue has been settled by the U.S. Supreme Court, and if confirmed, I would, of course, apply it.

Senator SESSIONS. Well, I think at, at least at one time, they argued it was unconstitutional and cruel and unusual punishment.

They opposed three strikes sentencing laws and they opposed school vouchers for sectarian schools, arguing that that is unconstitutional. Have you any thoughts about that? Do you agree with that or not?

Ms. BERZON. The school voucher question is obviously a complicated one-

Senator SESSIONS. It is.

Ms. BERZON. [continuing] Because the Supreme Court law in the area of the Establishment Clause and schools in particular has been changing recently. The questions obviously involve some balance between the interests of parents in determining where their

children go to school against the establishment clause, concerns that have been raised in earlier Supreme Court cases. This is an issue that really could come before the ninth circuit and I really would hesitate to mention anything further about it.

Senator SESSIONS. The ACLU supports decriminalization of drugs. Do you favor that?

Ms. BERZON. I am not aware whether the ACLU does favor decriminalization of drugs. It is not an issue-

Senator SESSIONS. It is on their website.

Ms. BERZON. It is not an issue, as such, that I recall the board of directors dealing with while I was on it, the California board of directors.

Senator SESSIONS. Would you agree with that or disagree with it?

Ms. BERZON. I do not agree with the decriminalization of drugs as a personal matter.

Senator FEINSTEIN. Would you repeat that again?

Ms. BERZON. I do not agree with that. As a parent, I have had obvious concerns, but fortunately, no problems, with respect to drug issues, and I, certainly as a legal matter, I regard those questions as within the province of the legislature.

Senator SESSIONS. Well, I thank you for your patience. This has been a delightful constitutional discussion of sorts. I am sure probably you might not have felt it that way, but I have learned a lot

and I thank you for your courtesy and I appreciate that.

Senator Feinstein.

Senator FEINSTEIN. Thank you very, very much.

Ms. BERZON. Thank you very much, Mr. Chairman.

Senator FEINSTEIN. I know it was quite an ordeal.

Senator SESSIONS. You are an able lawyer and have a lot of good references.

The committee is adjourned.

MARSHA BERZON
WEDNESDAY, JUNE 16, 1999
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:59 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Thurmond, Sessions, Smith, Leahy, Kennedy, Feinstein, and Schumer.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. We are just a minute early, but I think we will start anyway. How is that?

Today we are holding a judicial nominations hearing for 8 nominees-that is rather rare-2 circuit nominees and 6 district court

nominees. Now, this hearing follows the committee's approval of 2 judges earlier this year, and I note this hearing is approximately 3 months earlier in the year than the first hearing for circuit and district court nominees in 1993, when I was in the minority on this committee. Also, I note that there was only one hearing for circuit and district court nominees in all of 1993.

It is my expectation that the work of the committee will continue at a reasonable pace throughout this year. This is important work and I take it seriously, and we will continue to do our best.

Of course, the committee cannot approve nominees that have not been sent to us by the President. As the Chief Justice noted in his most recent report on the judicial branch: The entire Sentencing Commission is vacant. We have seven seats that are still vacant, and not a single nomination has been made. Without any commissioners, no Sentencing Guidelines can be passed for new criminal

statutes, no modifications can be made to existing guidelines to address issues raised by the courts. So I look forward to working with

the President and others to ensure that this important Commission can obtain a slate of Commissioners and get back to work this year.

Together, Senator Leahy and I have ensured that the President's nominees receive a fair hearing and that Federal courts are adequately staffed to perform their constitutional function.

This committee has been instrumental in the Senate's confirmation of 306 judicial nominees and over 200 other nominees by President Clinton. By conducting thorough but expeditious reviews of nominees

and by holding hearings, we should be able to keep the number of vacancies from inhibiting the work of the Federal courts and other bodies.

I am confident that by the end of this session the committee will have done a fair and even-handed job of evaluating and approving judicial nominees just as it has done in previous years. I look forward to working with my colleagues on the committee to accomplish this.

Now, today we have three panels. The first panel will consist of the sponsors of the nominees who will make short statements on behalf of their nominees. The second panel will consist of the two circuit court nominees, and the third panel will consist of the six district court nominees.

So if I could call those who are going to speak for the judges forward. Senator Lott and others, if you will take your seats here, we

would appreciate it.

Excuse me. Senator Kennedy is here. We will be glad to turn to him.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR
FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you, Mr. Chairman. I wanted to express my appreciation for scheduling the hearing, and we look forward to our pending nominees.

I am particularly pleased that the nominations of Marsha Berzon and John Ward and Karen Schreier are among those we will be reviewing today.

Ms. Berzon is an outstanding attorney with an impressive record.

She has written more than 100 briefs and petitions to Supreme Court, argued several cases there. When she was first nominated last year, she received strong recommendations and had a bipartisan list of supporters, including our former colleague, Senator Jim

McClure. Fred Alvarez, a Commissioner on the Equal Employment Opportunity Commission and Assistant Secretary of Labor under President Reagan, supports her. I hope we can move expeditiously

on her nomination. It was first received in the committee in January 1998, and she has answered numerous questions on a wide

range of topics during a previous hearing and in writing.

We know the magnitude of the task before us. There are currently 65 vacant judgeships in the Federal judiciary; 12 additional

vacancies are likely to open up in the coming months when more and more judges retire from the Federal bench. Of the 65 current vacancies, 28 have now been classified as judicial emergencies by the Judicial Conference of the United States, which means they have been vacant for 18 months or more. In the District of Western Pennsylvania, one position has been vacant since November 1994, 4 1/2 years, inexcusably long by any standard.

So I want to commend you, Mr. Chairman, for having the hearing. I look forward to working with you so we deal effectively with

the backlog and meet our constitutional responsibilities in the confirmation process.

I thank the Chair.

Chairman HATCH. Well, thank you, Senator Kennedy.

I think we will turn to the distinguished Majority Leader first

and then Senator Cochran and then, if I could, I will turn to the distinguished Senator from New York. I will try and do this, if I

can, on a seniority basis. If Senator Daschle arrives, we will interrupt and allow him to make his speech because we know our leaders have a lot to do in addition to all of us, but we will show that

kind of deference.

So, Senator Lott, we are happy to hear from you.

STATEMENT OF HON. TRENT LOTT, A U.S. SENATOR FROM THE
STATE OF MISSISSIPPI

Senator LOTT. Thank you, Mr. Chairman, Senator Kennedy, Senator Leahy, and my colleagues here on the panel. I was just noting

to Senator Liebermam and Senator Dodd-

Chairman HATCH. Senator Lott, if I can interrupt you, the ranking member is here and he wants to make his statement.

Senator LEAHY. No, no. That is all right. I am just very excited to be at our first confirmation hearing this year, the longest the Senate has ever taken to hold a hearing in the 25 years I have been here. I am so excited that I really wanted to be here and see this.

I will submit a statement. I don't want to hold up this distinguished panel, all of whom are good friends.

Senator LOTT. Thank you, Senator Leahy. And, Mr. Chairman,

again, I was just saying with this panel, if we could do a little legislative business while we were here, there is no telling what we

could get done right here at this table.

[Laughter.]

Chairman HATCH. This is a good bunch to do it with.

Senator SCHUMER. I would also like to join Senators Feinstein and Moynihan in reintroducing you to Marsha Siegel Berzon. Although she is now a

Californian and has been nominated to serve on the ninth circuit,

Ms. Berzon grew up in a place I know pretty well, Brooklyn, NY,

my hometown, and then she moved to Long Island and East Meadow, ultimately graduating from East Meadow High School, and her

affiliation with New York also includes study at Columbia University and service as a distinguished practitioner in residence at Cornell University Law School in Ithaca. And we New Yorkers are

glad to be able to claim Ms. Berzon as one of our own as well as

a Californian because she is an extremely well regarded appellate

litigator and scholar. And we also like the idea of putting native

New Yorkers on the bench outside our great State. It stands to improve the quality of justice in the country.

Anyway, in the interest of time-

Chairman HATCH. Don't make it rougher than it is. OK?

[Laughter.]

Senator SCHUMER. In the interest of time, I will say no more except to thank you, Mr. Chairman, for the opportunity to testify at

this hearing.

Chairman HATCH. Thank you, Senator Schumer.

Senator MOYNIHAN. Mr. Chairman, may I say I last year introduced Ms. Berzon to the committee, and Senator Feinstein will add

a statement I have made at the conclusion of her statement.

Chairman HATCH. Thank you, and we recognize your strong support. This has been good praise for your nominee, Mr. Katzmann,

and for Ms. Berzon. We appreciate it.

We would be glad to release you from the table. We appreciate

you taking time from your busy schedules to be here.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR
FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman and members of the committee. I would like to speak on behalf of two people. One is Marsha Berzon and the other is Gary Feess.

Mr. Chairman, I believe it was last July 30, and I believe Senator Sessions and I were the members of the committee that heard

Marsha Berzon. I want to pay special tribute to Senator Sessions.

He was thorough, he was probing, he was intrepid. I think the

hearing went on for just about 2 hours, and virtually I felt at the

end of it that this was equal to a hearing that the full committee

had for an Associate Justice of the U.S. Supreme Court. Virtually

every question I have ever heard at one of those hearings had been

asked of Mrs. Berzon, and I want the committee to know how very

well she acquitted herself, and I think Senator Sessions would

agree with that.

I also want the committee to know, Mr. Chairman, that Marsha

Berzon, believe it or not, had a life after Brooklyn, NY. She went

West where the major portion of her career began to unfold in California. And she is a highly skilled attorney. She has appeared numerous times before U.S. circuit courts, district courts, and every

level of California State courts. She has argued four cases before the U.S. Supreme Court. She has filed dozens of briefs on a wide variety of cases before the Supreme Court.

She was a distinguished student at Boalt Hall, the University of California. She was Order of the Coif, and she was Articles editor for the California Law Review.

Prior to entering private practice, she clerked for U.S. Court of Appeals Judge James Browning and for U.S. Supreme Court Justice William J. Brennan. She has practiced law with the San Francisco law firm of Altshuler, Berzon, Nussbaum, and Rubin since 1978. She has been a partner of the firm since 1990. She has won, in fact, impressive support from Democrats and from Republicans as well as virtually a wide panoply of law enforcement agencies.

Let me read just a couple of samples. Former Republican-appointed Deputy Attorney General and Administrator of the EPA,

William Ruckelshaus, says, "Her intelligence and genuine good judgment allow her to transcend partisanship. She would make an excellent addition to the Ninth Circuit Court of Appeals."

J. Dennis McQuaid, an active Republican and partner at the San Francisco law firm of McQuaid, McQuaid, Metzler, McCormick & Van Zandt, writes, "I can recommend Marsha for confirmation without reservation. She enjoys a reputation that is devoid of any remotely partisan agenda and that her service on the court will be marked by decisions demonstrating great legal acumen, fairness, and equanimity."

The National Association of Police Organizations states, "Mrs. Berzon would be fair and impartial to law enforcement officers and open-minded to their concerns. She apparently understands the myriad of problems and difficult situations facing the line patrol officer every day."

Mr. Chairman, I strongly support Marsha Berzon's candidacy, and I am very pleased to be here today to help my colleague, Senator Boxer, and others introduce her to you. And if I might also on

behalf of Senator Moynihan submit a statement to the record?

Chairman HATCH. Without objection, we will place the statement in the record.

Chairman HATCH. Tim, if we could go to Senator Boxer first since we can finish those two judges, and then we will come back to you, and then we are going to wind up with Senator Hutchison.

STATEMENT OF HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Thank you very much, Mr. Chairman. I will be very brief, and I would ask unanimous consent that my entire statement be placed in the record.

Chairman HATCH. Without objection.

Senator BOXER. And I will summarize.

I have been asked by Marsha Berzon to say a few words about her, and rather than going through my statement, I thought I would just pick out some highlights and first ask if Marsha would stand. She is here with Stephen, her husband, and their daughter, Ali, and son, Jeremy, who happens to be a newspaper reporter in Riverside, CA.

You have heard about Marsha's qualifications, a woman who has argued cases before so many of the courts, including the Supreme Court. All of her accolades are in my statement, so I thought I would actually close with just a few brief statements from Republicans because I think it is important that we show the

broad support that Marsha brings.

Former Republican--well, let me start off with Senator Specter, a longstanding member of this committee, who wrote that he was impressed with Ms. Berzon's "intellect, accomplishments, and the respect she has earned from labor lawyers representing both management and unions." And I thank Senator Specter for those comments.

Former Republican Senator James McClure wrote, "What becomes clear is that Ms. Berzon's intellect, experience, and unquestioned integrity have led to strong bipartisan support for her appointment." And Dennis McQuaid, who was mentioned by Senator

Feinstein, I wanted to share with you, he ran against me the first time I ran for the Congress. So we finally found something we agree on, Marsha, Dennis and I. And he wrote wonderful words about Marsha. And W.I. Usery, former Republican Secretary of Labor, said of Marsha, "She has all the qualifications needed, as well as the honest and integrity that we need and deserve in the court system. I know she will be dedicated to the principles of fairness and impartiality."

Charles Curtis, who opposed Marsha in a case, *United Auto Workers v. Johnson Controls*, her opposing lawyer, said, "All who have worked with or against her know she is fair, reasonable, respectful toward opposing views."

And, finally, corporate secretary for Chevron, Lydia Beebe, has written that Marsha "has a reputation of being a brilliant attorney and of imposing an extremely high intellectual standard to whatever she does. She has the support of many in the employment and

labor law community, both on plaintiff and management side."

So, with that, Mr. Chairman, I hope you will look kindly on these two people. They are good people. They are strong people. They will make great judges.

Thank you very much.

Chairman HATCH. OK

If I could have all the judgeship nominees stand and be sworn, we will swear you all in. If you could just stand, raise your right hands. Do we have all of you up there? OK Do you swear the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. BERZON. I do.

Chairman HATCH. Thank you very much. I think what we will do, I think we will start with the two circuit nominees: Marsha S.

Berzon and Robert A. Katzmann. And then we will go to the district court nominees in the second panel-third panel, rather.

Senator LEAHY. Mr. Chairman, at an appropriate point, I have two statements from Senator Feingold that I want placed in the record.

Chairman HATCH. Without objection, we will place them in the record. Please take your seats.

Senator LEAHY. Mr. Chairman, while I did not give an opening statement, I would put my statement in the record.

I do want to point out again on the hearings that we should not compare this to 1993, the President's first year, as compared to the seventh year of a President's term in office. The first few months of that administration we had a confirmation of a new Attorney General that took four hearings over 3 months. We had 6 days of hearings in May and June of other top Justice Department nominations and a Supreme Court nomination. This year we have not had a hearing on executive branch nominations, and

the average time for Senate action on the judges confirmed was about 200 days.

Chairman HATCH. Let's be glad we are having a hearing now. Senator LEAHY. I am delighted, and I compliment you on that. I really do. And I mean that most sincerely.

Chairman HATCH. We are happy to welcome both of you here. We hope you will introduce your family members and friends that you have with you, and if you have any statement you would care to make, we will start with you, Ms. Berzon, and then with you, Mr. Katzmann.

TESTIMONY OF MARSHA S. BERZON, OF CALIFORNIA, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Ms. BERZON. I do not have any statement. I would like very much to thank you, Mr. Chairman, for holding this hearing. I would like to introduce, in addition to my husband and my children, who were already introduced, my parents, Jack and Sylvia

Siegel, who are here from New York. My mother was not able to join us last year at the hearing. I am very pleased that she is here this year. Also, my sister, Mary Berzon, who is from Virginia; my brother, Arthur Siegel, who is an accountant in New York; and my long-time law partner and friend, Fred Altshuler, who is here as well.

Finally, I would like to say that my sister, Beth Siegel, from Massachusetts was not able to be here today, and my mother-in-law, Ethel Spitzen, from Boca Raton, FL, was also not able to be here today because of her health.

Chairman HATCH. We are happy to welcome your family and your friends and relatives here, and we are grateful we finally have you here for this second hearing, really, and we are going to try and move ahead as quickly as we can.

Do you have any further statement to make, Ms. Berzon?

Ms. BERZON. No, I don't. Thank you very much, Mr. Chairman. We are happy to have both of you here. Now, we have a roll call vote, so I hope that some will go vote now and then come back so you can ask questions.

Senator SESSIONS. Mr. Chairman, I am supposed to preside at 4 o'clock. I don't know if others have a pressing need, but if you could allow me a few questions at the beginning. If not, I will understand.

Chairman HATCH. I will be happy to yield my time to you Senator, and we will let you take the time, and then if others could go vote and then come right back, then Senator Leahy and I can go.

Go ahead, Senator.

QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. Thank you, Mr. Chairman. I think both of these are extraordinarily skilled lawyers, and I appreciate your abilities, and I did enjoy very much, Ms. Berzon, our conversations.

Maybe we did take too long, but it was a very interesting discussion, and I enjoyed it very much. And I thought I would ask a couple of follow-up questions.

And you know-and I think I made it clear, and I have made it clear to others-that I am concerned about the ninth circuit. The New York Times has said the Supreme Court considers it a rogue circuit. It was reversed, I believe, 29 out of 30 times in 1997 and 1998. And in evaluating a nomination for the ninth circuit, I have publicly said I want to be sure that any nominee is going to help

bring it back into the mainstream of American law as set by the Supreme Court. And so any questions I make, maybe in a different circumstance at a different time I wouldn't be as insistent about it. But I think it is important. And I don't intend to support nominees unless I really believe that it has a possibility of improving that court.

I remember I asked you about Justice Brennan's decision on the unconstitutionality of the death penalty. He believed that the death penalty was unconstitutional. And I told you I thought that that was unfounded because there are multiple references to the death penalty and capital crimes in the Constitution. And I asked you whether or not you shared my view and how you felt about Mr. Justice Brennan's view, and you said you did not like to say what you agree with and what you do not agree with when you haven't had time to think about it. Fair enough.

Have you had time now and would you like to comment now?

Ms. BERZON. I would like to say first that I also very much enjoyed our discussion last year, and I certainly have had a chance

to think about it and to go back and look at the Constitution. And having done so, I would certainly agree that the indications of that document are that the Framers of the Constitution understood that capital punishment would be permitted under that Constitution.

There are, as you note and as the Supreme Court noted in *Gregg v. Georgia*, many references in the Constitution which indicate that the Framers certainly understood that there would be capital punishment under the Constitution.

Senator SESSIONS. And as a justice, do you feel it would be your duty to ratify in your opinions the understanding of the Framers when they adopted that Constitution and carry out its intent?

Ms. BERZON. As a judge of the ninth circuit, my primary duty and initial duty will be to follow the direction of the U.S. Supreme Court. The U.S. Supreme Court on this question has been quite clear about its conclusion that the death penalty is constitutional, and I will, of course, faithfully and completely apply that conclusion.

Senator SESSIONS. How do you feel about Justice Brennan's view that somehow despite these references and clear, explicit statements of approval of the death penalty in the Constitution explicitly written that he still would find it unconstitutional? Do you affirm or reject that view?

Ms. BERZON. I was a law clerk to Justice Brennan, as you know.

I admire him enormously as a man and as a mentor. I do not agree with everything that he said, and I think in particular that I intend to take a more literal view to statutes and to constitutional provisions than he does. It makes me more comfortable, and it is the way I tend to think.

Go ahead, Senator. I am sorry.

Senator SESSIONS. All right. Briefly, I asked you previously about-I followed up in writing with a question I raised at our initial hearing, and to refresh your recollection, you responded in August 1998, and I had asked you that if when you were vice president of the ACLU in Northern California you approved the ACLU's

filing of a lawsuit in *Michele AG v. Nancy S.* case. In that case, the ACLU's argument was that a homosexual partner who is neither an adopted or biological parent could be deemed a "parent in fact."

The ACLU did take that position, and it was rejected by the California Court of Appeals. And I was conferring a little bit with your

answer and would like to follow up.

In your written answers, when I asked you about your connection

with this lawsuit, you replied that you "had no recollection of this case until asked about it in connection with the hearing." Then you later in those written answers said you "checked with the ACLU NC"-Northern California-and learned that you were "not present at the meeting at which the case was considered," even though you were chair of that legal committee that set them-approved the filings. And then next you stated that you "learned on inquiry" that a close vote by the board as to whether or not to file that had occurred. It had been proposed by the staff, but that you "do not recall" how you voted or whether you voted and that the ACLU had no records specifying how you voted.

However, in your testimony before the committee, it indicates that voting on cases is not a routine proceeding by the ACLU, and it only occurs if "there is a dispute in the legal committee," which you chaired, or if someone specifically asked for a vote. In fact, your written answer indicated that it was a close vote by the over 30-member staff.

Given the controversial nature of that case and as evidenced by the fact that the board you chaired was closely divided over the issue and the fact that the votes of this kind appear to be an exception rather than the norm for the committee, would you share with

us how it is that we ought to understand you don't remember that?

And did you take a position that-have you been able to recall any position you took, and can you tell us more about your participation in that?

Ms. BERZON. The case, just to clarify for some of the other members who were not at the hearing and may not have read the questions, was one that dealt, as I understand it from reading the reported opinion-and I want to make clear that I have never seen

the brief that the ACLU filed in this brief-in this case. I don't ordinarily see them. I would not-have ordinarily seen them. And in this particular case, it was under seal, so I couldn't see it even after I was asked.

Not having seen it, I can only react based on the written opinion that resulted, and that opinion indicates that while the particular individuals who were having a visitation dispute here were homosexual partners who had been parenting this child, the issue in the

case really had nothing to do with them being homosexual partners--that is, one could have been a grandparent who was rearing

the child or a stepparent who was rearing the child or a foster parent who had been with the child for a long time. And the issue was one of whether people of that kind who the child will be severed from have some interest in visitation.

The issue is a very complicated one, as the justice who wrote the opinion for the California Supreme Court noted, on a policy basis and one he concluded was properly for the legislature, and would agree with that conclusion.

I have no specific recollection of the debate although I did learn, as I said in my answers, that it was a closely divided vote. I suspect-and I very much hesitate to say how I might have voted because I don't have a clear recollection, but I suspect that in a circumstance like that I would probably abstain.

And the reason I

suspect that is I tend in my participation in the ACLU to be most interested in issues and most concerned about issues having to do with the first amendment, with the rights of free speech and religion, and with discrimination, gender discrimination in particular.

And issues of this kind are very far from my expertise or concern, and when it became as contentious as it did, apparently, from the

vote, I would probably feel that I had little to add to the debate and probably would not have contributed. But I really don't remember. Senator SESSIONS. So you don't remember how you voted on that.

Ms. BERZON. I don't remember.

Chairman HATCH. Senator, your time is up.

Now, Senator Leahy would like to just ask a question or two before we go and vote.

QUESTIONING BY SENATOR LEAHY

Senator LEAHY. Ms. Berzon, you are familiar with the doctrine of stare decisis, I am sure.

Ms. BERZON. I certainly am.

Senator LEAHY. And do you accept that doctrine?

Ms. BERZON. I absolutely do.

Senator LEAHY. And so I can assume from that answer that the decisions of the U.S. Supreme Court you would feel would be compelling on your circuit?

Ms. BERZON. Absolutely, and if confirmed as a judge, I will follow them faithfully and carefully.

Senator LEAHY. And you would give great weight to prior decisions of your circuit?

Ms. BERZON. I will definitely do that.

Senator LEAHY. So it is safe to say that on decisions of the Supreme Court you feel your circuit is bound by that, and you as a

judge would be bound by that.

Ms. BERZON. Definitely the ninth circuit is bound by the decisions of the Supreme Court, and I as a judge would be bound by

them as well.

Senator LEAHY. But you as a judge are not bound in any way by past decisions of any organization, whether it is the ACLU or a social organization or any other organization. Those are not decisions

that bind you. Am I correct?

Ms. BERZON. To the contrary, as a judge I will, of course, be bound only by precedent, by the language of any statutes, by the language of the Constitution, by precedents in other circuits to the degree that they are relevant and convincing, and I absolutely will give no credence whatever to the views of any organization, including the ACLU. Indeed, I would expect that I would rule against the

position of the ACLU as often as that of any other organization.

Senator LEAHY. Looking at your background, I would not have expected any different answer. I am extremely impressed with your background. I hope that you will soon be sitting on that court.

Thank you.

Chairman HATCH. Thank you, Senator. We are going to have to go vote. As soon as Senator Smith gets back, he will ask some further questions, but we will recess until he gets back or until another Senator gets here and proceed as soon as I can get back.

Chairman HATCH. If we could begin, I apologize for the delay. I am going to put the written questions of Senator Thurmond into the record, and I would hope that you would answer them as quickly as possible. He directs questions to both you, Ms. Berzon, and you, Mr. Katzmann, and then he sends questions to the other judges as well. So I would hope that you would answer any and all written questions as quickly as possible. We will keep the record open to have written questions to the nominees until Friday, the end of business on Friday, if that is all right.

[The questions of Senator Thurmond are located in the appendix.]

Chairman HATCH. Now, Senator Smith, would you like to ask some

questions or would you like me to go ahead?

Senator BOB SMITH. Go ahead, Mr. Chairman. I will be ready in a minute. Why don't you go ahead?

QUESTIONING BY SENATOR HATCH

Chairman HATCH. Thank you. OK.

Let me ask you, Ms. Berzon, you certainly have an extensive record in the area of labor law, something that I take a great deal of interest in as well, representing various labor organizations and some very renowned cases. Now when many people

hear labor law, they generally think of cases between unions and employers. Your experience, as I understand it, however, includes instances in which you have been an advocate for unions in litigation against the employees they represent on issues ranging from

the right of employees who choose not to follow the union's lead in striking to the right of employees not to pay a portion of union dues used for purposes with which they disagree.

Now, Ms. Berzon, given your experience, can you assure this committee that you can be fair and impartial in adjudicating the rights of employees vis-a-vis their unions?

Ms. BERZON. Yes, absolutely. In all of those cases, I was, of course, representing a client as an advocate. I am keenly aware of the difference between an advocacy position and the position of a judge on the ninth circuit or any other court of appeals. In that position, if I am fortunate enough to be confirmed, I am certain that

I will be able and I commit that I will leave behind all positions of all of my clients and look with an open mind at the statutes at hand, at the precedents that are relevant, and at any constitutional provisions that are pertinent and so on.

Chairman HATCH. So you will abide by the precedents as established by the Supreme Court?

Ms. BERZON. I am sorry?

Chairman HATCH. You will abide by the precedents established?

Ms. BERZON. I absolutely will.

Chairman HATCH. Now, Ms. Berzon, in correspondence to this committee last July, you identified *Ho v. San Francisco Unified School*

District-that is a recent ninth circuit court case-as one in which the ACLU of Northern California participated while you were a board member.

Now, I have looked at the amicus brief the ACLU of Northern California filed in that case, and was interested to note that the principal argument advanced in that brief is that the court "should apply intermediate scrutiny" not strict scrutiny as the appropriate level of review in a challenge to a racial quota that had the effect of limiting the percentage of Chinese school children who could attend San Francisco's public schools.

Now, do you agree with the position advanced by the ACLU of Northern California that the quota at issue was constitutional even though there had never been a judicial finding that segregation existed in San Francisco's school system?

Ms. BERZON. I am at something of a disadvantage because I first saw a part of this brief, and only a part of it, last evening and I read the opinion of the ninth circuit as well. I was actually under the impression-and I could be wrong-that there was a judicial finding or at least that there was a consent decree that served as a-that was confirmed by the court and, therefore, served as a judicial finding. But I am not sure it is relevant to the issues that were

addressed in the amicus brief.

I know, as you do, Mr. Chairman, that the Supreme Court in *Adarand v. Peña* held that racial classifications are subject to the strictest of scrutiny, meaning that there has to be a compelling interest, and that any classification of that kind has to be extremely

narrowly tailored. The ninth circuit held that the issues in that case as to meeting those standards were sufficiently undecided, that there should be a trial on the question, and actually I know only from the newspapers that the case was settled before trial. In my role on the board of the ACLU, as Senator Sessions noted, there are only votes held by the board in rare instances, and in this instance there was no vote held by the board and I was not on the legal committee. I did have a chance to check that much.

Chairman HATCH. OK; and did I interrupt you?

Ms. BERZON. I am sorry.

Chairman HATCH. I thought I had interrupted you.

Ms. BERZON. OK

Chairman HATCH. You have mentioned the *Adarand v. Peña* case.

Do you agree that the quota at issue in this matter should have been tested under only an intermediate scrutiny rather than strict scrutiny?

Ms. BERZON. It seemed to me that the ninth circuit opinion holding that it was subject to strict scrutiny was fully consistent with

Adarand, and I would have no problem in applying that standard at all.

Chairman HATCH. They indicated that it would be subject to only intermediate scrutiny not strict scrutiny.

Ms. BERZON. I am sorry?

Chairman HATCH. They indicated that it would be subject to only intermediate scrutiny not strict scrutiny.

Ms. BERZON. They so argued, and it is not a position that I advocated. And as I say, I didn't vote on it either.

Chairman HATCH. So you would be for strict scrutiny.

Ms. BERZON. I was fully comfortable with Judge Newman's opinion in the ninth circuit.

Chairman HATCH. Let me ask both of you this question: Under what circumstances do you believe it appropriate for a Federal court to declare a statute enacted by Congress unconstitutional?

Ms. BERZON. The circumstances in which it is appropriate for a court to declare a congressional statute unconstitutional are, of course, quite rare. Such statutes come to the Court with a strong presumption of constitutionality, and in looking at such constitutional arguments, if I were confirmed, I would look carefully at any

precedents of the Supreme Court or of the ninth circuit. But absent a compulsion by them to declare a statute unconstitutional, I would do so only when it appeared to be compelled by the constitutional language or by the clear intent and the meaning of the Constitution.

Chairman HATCH. Thank you. My time is up.

Senator Smith, do you have questions?

QUESTIONING BY SENATOR SMITH

Senator BOB SMITH. Thank you, Mr. Chairman. Good afternoon to both of you.

I missed Senator Leahy's questioning, but I understand, Ms.

Berzon, that Senator Leahy asked you if you felt that the death penalty was unconstitutional, and you replied that it was constitutional. Is that correct?

Ms. BERZON. Yes; the U.S. Supreme Court has so held.

Senator BOB SMITH. I am sorry. Senator Sessions' question.

Ms. BERZON. Senator Sessions did ask me that, and, yes, I agreed with him that-

Senator BOB SMITH. Do either of you have any moral or religious or any other personal convictions that would keep you from voting to apply the death penalty in an appellate case?

Ms. BERZON. I do not.

Senator BOB SMITH. On the issue of judicial precedent, what is your view on judicial precedent? I think Senator Leahy asked you about judicial precedent, and I missed that. I think you replied that you supported judicial precedent. Is that correct?

Ms. BERZON. I certainly do. I would be constrained as a ninth circuit judge to follow the precedent of both the Supreme Court and the ninth circuit, and I would do so.

Senator BOB SMITH. Even if you viewed the decision to be wrong?

Ms. BERZON. Yes, even if I viewed the decision to be wrong, with the minor caveat that in the ninth circuit there are times when there are votes as to whether to hear a case en banc, and in that case I would vote in accordance with the guidelines of the ninth circuit whether to hear the case en banc.

Senator BOB SMITH. Well, let me ask you a tough question on judicial precedent. Were you to have been on the Supreme Court in 1867 when the Dred Scott case came down, Judge Taney indicated in that decision, the majority decision, that Dred Scott was a personal property and, therefore, could not sue in Federal court. We now had precedent that was never overturned by the courts, but it was overturned by some amendments to the Constitution. So if you had had the chance to vote to reverse that judicial precedent, how would each of you have voted?

Ms. BERZON. If you would like me to begin, it is a provocative question, and I note that there is also a set of precedents from the Supreme Court regarding the very rare circumstances in which overturning precedent is appropriate. And one of those circumstances is that it is more appropriate in constitutional than in statutory cases because, with regard to statutory cases, Congress can alter the statute much more easily than it can alter the Constitution.

Now, you have actually pointed to one instance in which Congress did alter the Constitution, or Congress and the people altered the Constitution, but that is relatively rare.

So there is slightly more room in a constitutional case, but, again, as a ninth circuit judge, it would be quite rare because that prerogative is primarily that of the Supreme Court.

Senator BOB SMITH. Do you have the same view on Plessy v. Ferguson, Ms. Berzon?

Ms. BERZON. Yes, I do. And as I said, the considerations here with regard to the Supreme Court and appellate courts are really quite different.

Senator BOB SMITH. No, I understand, but the issue in a generic sense was judicial precedent, and I think you both admittedly stated that you didn't feel that would necessarily be the case at the appellate level. You did give a qualifier on both your answers. I just want to make sure the record is straight. You both gave me a qualifier on judicial precedent on both Plessy v. Ferguson, which was overturning segregated schools, and Dred Scott, which was not allowing a black man who was considered property to sue in Federal court. So you did give two qualifiers. I don't want to misrepresent what you said, but that is the way I read what you said. So now I am going to get you to the least

controversial of all the questions I have asked so far, but that is why I wanted to hear your answers to these questions first, which is-I was being funny-the issue of abortion, which is obviously one of the most controversial issues of the day. So if we use the issue of judicial precedent in Roe v. Wade, what is your view on Roe v. Wade, each of you?

Ms. BERZON. The Supreme Court, as you know, spoke to that precedent in Casey v. Planned Parenthood, both with respect to its continuation as precedent and with respect to the precise standard that is applicable under Roe v. Wade as modified by Casey. Casey fully explored the stare decisis considerations, and, again, as a circuit court judge, I am bound by Casey in that regard. Casey held that balancing the women's--the State's concern for fetal life beginning at conception against women's constitutional right that the applicable standard is whether there is an undue burden on that right, and in applying that standard has held certain regulations of abortion, including parental consent, waiting periods, and others, valid. Again, as a ninth circuit judge, I would apply both the general standard and the particular precedents carefully and faithfully, and I would have no opportunity really to consider whether it should be changed, and I would not do so.

Senator BOB SMITH. In a personal sense, if both of you could answer this, do you believe that an unborn child is a human being?

Ms. BERZON. As I said, Senator, my role as a judge is not to further anything that I personally believe or don't believe, and I think that is the strength of our system and the strength of our appellate system.

The Supreme Court has been quite definitive quite recently about the applicable standard, and I absolutely pledge to you that I will follow that standard as it exists now, and if it is changed, I will follow that standard. And my personal views in this area, as in any other, will have absolutely no effect.

Senator BOB SMITH. Well, look, and I want to say to both of you I appreciate the fact that you are answering my questions. That is not always the case here, and you are, I think, making an honest attempt to answer the questions, and I appreciate it. But I think

what we have in the case of-I agree with you on judicial activism on either side of the political spectrum. I am not in favor of judicial activism. I think that judges and Justices should support the Constitution pretty much in a constructionist way as it is written.

The difficulty for me, and I think for many, on Roe v. Wade is that by making abortion the law of the land, many would say there is nothing in the Constitution that would provide for that kind of decision to be made. There is no mention of abortion in the Constitution. There is mention of life and the protection of life, but there is no mention of abortion.

And so I think what we have here is an opportunity to say that a life could be taken at any stage; although it is not frequently done in the third stage, there is no restriction on that. And that is the reason I am asking the question. Does the unborn child have a right to life at any point during the 9 months of pregnancy? And if so, at what point? And I think that is a fundamental question that I don't think is an unfair question for a person who, although it is the appellate court, could very well at some point be considered at a higher court, and also very well could face a decision dealing with that issue on the appellate court.

So that is the question that I would like to ask. Does the unborn child have a right to life at any point during the pregnancy? And if so, when, in your view?

Ms. BERZON. My understanding of what the Supreme Court ruled in Casey, which is the case that I would be constrained to apply if I am confirmed to the ninth circuit, is that the State does have an interest in the life of the child from the time of conception, but that there is a competing interest as well in the women's medical rights and otherwise, and that the result of balancing those competing rights, the Supreme Court has instructed us is that the right to abortion is upheld as long as-only if there is no undue burden on the right to abortion.

I have no choice but to answer you that that is what I would apply if I was on the ninth-if I was confirmed to the ninth circuit. And if I answered anything else, I would not be faithful to the role that I will have as an appellate judge.

Senator BOB SMITH. Well, let me move it all the way to the end to the most dramatic of all abortions, which is the so-called partial birth abortion. There is a possibility, although not likely, that we will overturn the President's veto on this. Were that to happen, it would be in the courts, and the constitutionality would have to be determined of that act.

Is the partial-birth abortion ban, as we now know it, the law, the bill that has been passed that has not become law, is that in your view constitutional or unconstitutional as you interpret the Constitution?

Ms. BERZON. And I essentially agree with that answer. I note again that the Casey standard would be the applicable one, and that the answer might turn on the details of the particular statute.

I understand that there have been some partial-birth or late-term abortion statutes that have been held unconstitutional, but apparently for reasons having to do with the particular scheme at hand.

Again, the standard would be whether there was an undue burden on the right to abortion, taking into account the State's interest in life from the time of conception, and that is the standard I would apply. It would be obviously inappropriate to say anything further than that precisely because the issue might come before a court on which I or Mr. Katzmann could be sitting.

Senator BOB SMITH. Your term "competing interests," though, is an interesting one because you are viewing the term competing interests between the mother and the unborn child. Would you take that competing interest to two individuals, one of whom tried to kill the other one? You don't carry it that far, do you?

Ms. BERZON. Again, I am simply repeating the standard that the Supreme Court has articulated, and it is not my standard.

Senator BOB SMITH. But we indicated twice now in two different examples, by your own admission, that the Supreme Court was wrong at least twice in American history, once in Dred Scott and once in Ferguson, very dramatic and important cases.

And I would say just for the record-and I am not looking-to argue; I have learned after many years of this that arguing doesn't do any good, but discussing sometimes does. I would argue that in the case of Ferguson, segregation was a horrible situation, as was the situation of determining that a black person was property and therefore had no legal right to sue. Those were both dramatic departures from the norm from what is right and wrong in America.

And I would venture to say I would add number three to that, and that is the taking of a life of an innocent unborn child, 35 million of which, 35 million of which, have been lost since the Roe v.

Wade decision in 1973. They will never have a chance to be a judge. They will never have a chance to be a mother or a father because of a law that was passed-a Court decision that was made, excuse me, which denied them that opportunity.

And neither one of you are willing to sit here and tell me that you think that is wrong. Is that correct? I mean, I haven't heard anybody say it yet. So 35 million children never have a chance to be here or to be up here or to be out there and have the opportunity to live their dream because of a Court decision. And had it not been for the guts of somebody in Ferguson and the guts of somebody who wrote those 13th, 14th, 15th amendments, we may still have slaves in this country that would never

be able to sue. And we may very well have segregation in this country.

Chairman HATCH. Senator, if I could-

Senator BOB SMITH. A last point, Mr. Chairman. You have been very patient.

Chairman HATCH. Yes.

Senator BOB SMITH. And I think in this particular case, I would add abortion to that list, and I would say that 35 million children lost

is a terrible comment on American society. And I deeply regret, really, with all due respect to both of you, that neither one of you can say that.

Chairman HATCH. Well, Senator, if I could interrupt, you have asked some very appropriate and good questions. I interpret it a little bit differently. Both of them, in my opinion, have said that they are not sure how they would decide that case, and that they wouldn't want to give the opinion that they have now anyway without hearing all the facts and the evidence.

Senator BOB SMITH. Well, I didn't ask about a specific case, Mr. Chairman.

Chairman HATCH. No, but I mean-

Senator BOB SMITH. I asked about their point of view, whether or not life was-

Chairman HATCH. But they both say that that could likely come before them and they are going to have to decide it at that time. And

that is a little different from saying that they would not find that process unconstitutional. And I don't know how they can say much more than that at this point in this meeting.

But I share the distinguished Senator's feelings and I share his point of view that it is a tragedy that we have had this issue go as far as it has in our American way of life. And I just hope that both of you will look at the precedents, and also look at what is right and wrong, if that case ever comes before you.

Senator BOB SMITH. Well, I would just make a final point.

Chairman HATCH. Sure.

Senator BOB SMITH. In the case of the Missouri case where you represented the ADA in your amicus brief in the Webster case, I mean

I assume you agree with the ADA's position on that case.

Ms. BERZON. Actually, in the-you are referring to me?

Senator BOB SMITH. Yes, ma'am.

Ms. BERZON. In my brief, which was an extremely limited one, I did not address any of the abortion issues in that case as such.

The only issue that I addressed was a first amendment issue regarding the communication between doctor and patients and that is all.

Chairman HATCH. I think the question I would like to ask is will you set aside your own personal views and feelings in order to decide the case on the law rather on what your personal views are?

Ms. BERZON. Absolutely, and I believe that I have so indicated.

Chairman HATCH. I will be honest with you, Ms. Berzon. On the Ninth Circuit Court of Appeals, we have people there that could care less what the law says. I mean, I hate to say it, and that is what causes me all kinds of problems here on the committee with putting Ninth Circuit Court of Appeals judges through because they are so afraid that we will just have more of the same.

And I have had very liberal judges come up to me and say it is a disgrace what they are doing out there, and they are hurting all of us who are sincere liberals who really want to abide by the law and implement the law as it is written.

Senator BOB SMITH. Mr. Chairman, could I just make a point on that?

I understand what both of the nominees have said here, and as far as judicial activism is concerned, I agree with what Mr. Katzmann said about judicial activism. But what I am saying is if you apply the standard of judicial precedent strictly that you never overturn the law, then you never make a decision, then you would never have overturned-

Chairman HATCH. Nobody is going to-

Senator BOB SMITH. Excuse me. You would never have overturned the Ferguson case of segregation and you never would have overturned the Dred Scott decision if there had been such a vote before the Court. And that is my only point and I am just saying that I believe abortion belongs in the same league with those other two

cases. That is my point.

Chairman HATCH. Well, it is a good point, no question.

Let me just say this, that I have seldom seen better qualified nominees for circuit court positions than the two of you. While we may differ on certain philosophical points, the fact of the matter is you are both highly qualified. You both have extensive experience in the law. And in your case, Ms. Berzon, you have been here-this is your second time, and it was an extensive, extensive hearing before that went on for hours and there is an extensive record with

regard your nomination.

There is another vote, so let me just say this. We are honored to have you here. The President has submitted both of you and we will see what we can do to move your nominations ahead. And we appreciate the forbearance that you have had, in particular, Ms.

Berzon. I have great regard for you, as well as Ms. Berzon.

There are many other questions we probably could ask, but I think in your case, Ms. Berzon, an awful lot of them have been asked.

I would just ask that when you get there, don't be activist judges; be judges who really abide by the law and set a standard for judges that help us so that it doesn't come down to an issue of liberal or conservative, but it comes down to an issue of understanding the role of judges in our society so that we don't hurt our society.

But in any event, unless you have any further questions, Senator

Smith, I think we will release both of you for today. We congratulate your families. I am going to do my best to have all of these

judges who are up today on next week's markup. I can't do it by tomorrow because we do have written questions, and so forth. But by next week's markup, I will try and have you on the-and some of you may be put over for a week, so just understand the process. Anybody can put any item that appears first on the list over for I week, but then it has to be voted upon at the next markup. So we will move as expeditiously as we can.

Ms. BERZON. Thank you very much, Senator Hatch.

Chairman HATCH. Thank you both for being willing to serve.

KERMIT BYE
WEDNESDAY, NOVEMBER 10, 1999
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:31 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Biden, Feinstein, and Schumer.

OPENING STATEMENT OF HON. ORRIN G. HATCH A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. We are happy to welcome everybody here. Today, the committee is holding its seventh nominations hearing for this session of the 106th Congress. We will hear from 5 judicial nominees, 2 circuit court nominees and 3 district court nominees.

We have two panels today. The first panel will consist of the sponsors of the nominees, who will give brief statements on behalf of their nominees. And we are happy to welcome all of these distinguished sponsors here today. The second panel will consist of the nominees themselves.

Before we turn to the panels, I believe Senator Feinstein is going to come. She met me going into the Senate floor and said she would be a little bit late, and we will recognize her as soon as she comes to make a statement on behalf of the minority.

Now, I am happy to welcome the sponsors here today, the distinguished gentlemen at the table.

As I understand it, Senator Moynihan, you have been here a long time and you need to leave.

Senator MOYNIHAN. Well, sir if I may, I would like to defer to my revered colleague and your friend, Mr. Rangel.

Chairman HATCH. Could I ask a favor of you? Senator Smith needs-

Senator MOYNIHAN. I do not have to leave, sir. I defer to my friend.

Chairman HATCH. Could we let him give his opening statement and accommodate him, and then I will turn to you, Senator Moynihan?

And, Charlie Rangel, I am going to turn to you. If you are going to be my Vice President, I want to recognize you right off the bat.

[Laughter.]

Mr. RANGEL. That makes a lot of sense to me, Mr. Chairman.

Chairman HATCH. It makes a lot of sense to me, too.

Senator Biden has graciously agreed to proceed with the sponsors, so let's turn to you-

Senator BIDEN. Mr. Chairman, only because I thought that Senator Smith was introducing Congressman Rangel as a nominee for

the court. I thought that is why he was here.

Chairman HATCH. He would want to be on the Supreme Court. I know him real well.

Senator MOYNIHAN. He is here as a candidate for the vice presidency on an important ticket that may yet evolve in the mists of

New Hampshire.

Chairman HATCH. That is right.

Senator BIDEN. Sign me on.

Chairman HATCH. I have agreed to take him as Vice President, but that is only if Senator Moynihan and Charlie really help me to get above 1 percent in the polls.

[Laughter.]

But don't worry. People are starting to realize that I am in the race.

Senator BIDEN. In my experience, that is when it gets dangerous.

Chairman HATCH. That is right.

Thank you. We will excuse you, then.

Let us turn to Senator Conrad.

STATEMENT OF HON. KENT CONRAD, A U.S. SENATOR FROM THE STATE OF NORTH DAKOTA

Senator CONRAD. Thank you, Mr. Chairman, and I thank Senator Biden, the ranking member, as well for being in attendance at this hearing. And thank you, Mr. Chairman, for including Kermit Bye in this hearing schedule.

I am very pleased to be here to announce my strong support for Kermit Bye for the Eighth Circuit Court of Appeals. I would also like to take a moment to ask his wife, Carol Beth, who is here in the audience, to stand and be recognized, if we could.

[Ms. Bye stood.]

Chairman HATCH. We are happy to have you here.

Senator CONRAD. They are a terrific team. We regret their children could not be here today, but I want to acknowledge them as

well-Laura, William and Bethany.

Kermit is a native North Dakotan, and this is a true story, Mr.

Chairman and ranking member. He was born in the middle of a North Dakota blizzard in a railroad section house in Hattone, ND.

Now, those are the right roots for the Eighth Circuit Court of Appeals.

Chairman HATCH. That is enough for me. We don't even need to hear him.

[Laughter.]

Senator BIDEN. I thought everybody in North Dakota was born in those circumstances.

[Laughter.]

Senator CONRAD. Just those born in January.

Kermit Bye is widely recognized as one of the finest trial attorneys in the State of North Dakota. He would bring a wide range

of experiences to the bench. Kermit is somebody, growing up, who

worked in a lot of different jobs. He worked as a milk truck driver,

a radio advertising salesman, at catalog sales at Montgomery

Wards. He, after completing law school, worked as the North Dakota Deputy Securities Commissioner, and then served as assistant

U.S. Attorney for the District of North Dakota.

Since 1968, Kermit has been a prominent partner in one of the

most respected law firms in our State, the Vogel law firm. The

Vogel law firm has produced other eighth circuit judges, including

the one that just preceded Kermit Bye, John Kelly, who died tragically, I think this committee will recall.

He was named president of that firm in 1981. He has over 30

years of litigation experience. He has tried more than 100 cases, arguing numerous appeals, including more than 20 before the eighth

circuit. He has served on the board of governors and as president

of the State bar association in North Dakota, and he is broadly

supported in North Dakota. The Chairman, the ranking member

and the other members of this committee have seen the really

broad support that he enjoys, not only the congressional delegation

here, but the former Republican governor of our State, the former

Republican State chairman, the former Republican senate majority leader in the North Dakota Senate, the former Republic house majority leader in the North Dakota House, and many others who have written of their support of this candidate.

One of his supporters is the man he has been nominated to replace, Judge Frank Magill. Judge Magill has been on senior status

since April 1, 1997, and was appointed to the eighth circuit by President Reagan. He says in his letter to you, Mr. Chairman, "I have had a long-time association with Kermit Bye. His professional competence and integrity are of the highest order. He has several decades of trial experience. I know from personal experience that he will be an easy fit for your criteria of judicial temperament." Mr. Chairman, we could not be more proud than to present to this panel Kermit Bye, of North Dakota, for the Eighth Circuit Court of Appeals, and again we want to thank you for your consideration. Chairman HATCH. Thank you, Senator Conrad. That is very good praise indeed.

Let's turn to Senator Dorgan at this time.

STATEMENT OF HON. BYRON L. DORGAN, A U.S. SENATOR FROM THE STATE OF NORTH DAKOTA

Senator DORGAN. Mr. Chairman, thank you very much, and thank you to the Senator from Delaware as well. Senator Conrad has said virtually all there is to say, and we can say it three times among the delegation, but you don't need to hear this three times. Let me just mention a couple of additional items.

I am just as proud as I can be to join my two colleagues, Congressman Pomeroy and Senator Conrad, in supporting this nomination. I have known Kermit and his wife for better than 30 years. Their daughter worked as an intern in my office, as a matter of fact.

You know, Mr. Chairman, that we had an untimely death of Judge Kelly, and a tragic death. We knew when that occurred that we were going to have to make some recommendations, and we knew immediately that Kermit Bye was the obvious choice to succeed him. Senator Conrad has mentioned the president of the prestigious law firm, one of our State's most distinguished and respected trial attorneys, and a wide range of credentials of that sort. Let me just mention something else. In addition to all of those credentials, Kermit Bye is what we call in North Dakota a good neighbor. Yes, he is a wonderful lawyer, has risen to the top of his profession, but he is a good neighbor.

He volunteers. He is involved in community efforts in a wide range of areas, and his pro bono work on behalf of clients has been deeply appreciated by so many folks who couldn't otherwise have had legal assistance. And he is just, as I said, a fellow that we consider the best in North Dakota. He is a man of impeccable integrity and great judgment, sound judgment. He has a healthy dose of North Dakota common sense, and I know that when you have an opportunity to hear Kermit Bye today, you will understand why we, the three of us representing North Dakota's delegation, and joined by Republicans and Democrats throughout our State, speak so highly of this man who will contribute so much to the eighth circuit court when he is confirmed by the U.S. Senate. Chairman HATCH. Thank you, Senator Dorgan.

We are happy to have you, Congressman Pomeroy. We will take your testimony.

STATEMENT OF HON. EARL POMEROY, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NORTH DAKOTA

Representative POMEROY. Thank you, Mr. Chairman. I will be brief. Twenty years ago last month, I was sworn in as a member of the North Dakota bar. As I think back on that day, I think two things; first, how glad I am the statute of limitations has now run on all my legal work and, second, how honored I was at that time to become a member of this profession.

As we all do in our early legal days, we identify role models, outstanding practitioners whose legal skill and whose personal integrity we ourselves want to model. As I practiced law in my hometown of Valley City I watched Kermit Bye in Fargo, one of Fargo's and one of North Dakota's outstanding lawyers. Again, this is 20 years ago. I got to know Kermit and he was a mentor to me and a friend to me during those early days of law practice. I have enjoyed watching his contribution to the profession as he has become the State president of the bar association, on the ABA Board of Delegates. He has also made a very significant contribution to his community.

Years later, I was the State insurance commissioner. I had a chance to observe Kermit as a practitioner from a completely different perspective. Again, the same notions I earlier had rang

true-a thorough legal competence; in fact, excellence and deep integrity in all respects as he practiced his craft.

I think that the constitutional Framers anticipated that we would advance truly our best to these critical jurist positions, and with the candidacy of Kermit Bye, North Dakota has done precisely that. He is a lawyer, he is a leader, he is a family man, and he is truly one of North Dakota's most distinguished citizens. He will be a superb judge on the eighth circuit, a place that will not be at all unfamiliar to him, as he has had more than 20 appeals argued before that very court.

So I am pleased to join my colleagues in advancing Kermit's nomination to you.

Chairman HATCH. Thank you very much.

I have to tell you, Mr. Bye, that these three friends have worked hard, especially these two Senators. They have been on my back for a long time, and I have to say they have done a very good job. And Governor Schafer called and asked that we--he personally called my office requesting that we move forward with this nomination.

So I think it is much to your credit that you have this type of support. And I really appreciate you gentlemen being here; we appreciate you.

Representative POMEROY. Thank you.

Chairman HATCH. Thank you.

Let's call Thomas Ambro, of Delaware, to be U.S. circuit judge for the third circuit, and Kermit E. Bye, of North Dakota, to be U.S. circuit for the eighth circuit.

If I could swear you all in, would you all raise your right hand? Do you solemnly swear that the testimony you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BYE. I do.

TESTIMONY OF KERMIT E. BYE, OF NORTH DAKOTA TO BE
U.S. CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT

Mr. BYE. Mr. Chairman, it is indeed a privilege to be here. I thank you for including me in this hearing. You have already met

my wife, Carol Beth. I have three children who are here with us in spirit-our daughter, Laura, from Sioux City, IA; our son, William, from Fort Lauderdale, FL; and our daughter, Bethany, from Fargo.

With that, I don't have any further statement, and again thanks to the chairman and the members of the committee for this opportunity.

Chairman HATCH. Thank you.

Mr. Bye, you have had substantial experience in litigating complex cases before trial and appellate courts. Over your distinguished career, you have seen nationwide class actions filed in both Federal and State courts become more frequent, more complex, more expensive.

Currently, Rule 23 of the Federal Rules of Civil Procedure and 28 U.S.C. 1407 and 1408 govern class actions and multidistrict litigation, respectively. In your opinion, what role can Federal trial

and appellate courts have in reducing the cost and complexity of class action suits?

Mr. BYE. Thank you, Mr. Chairman. That is a very profound question. It would be my view that Federal courts can do much in the way of case management, class action, but one of them certainly very important and very significant in recent years. It would

certainly be my endeavor to work toward the efficient administration of justice by moving cases along, the docket, as quickly as possible, following the rules and giving deference and rights, of course, to the litigants.

Chairman HATCH. Let me just ask all of you this question. The Founding Fathers believed that the separation of powers in a government is critical to protecting the liberty of the people. Thus,

they separated the legislative, executive and judicial powers into three different coequal branches of government, naturally the legislative power being the power to balance moral, economic and political considerations and make law, the judicial power being the power only to interpret laws made by Congress and by the people.

In your view, is it the proper role of a Federal judge when interpreting a statute or the Constitution to accept the balance struck

by the Congress or the people, or to rebalance the competing moral, economic and political considerations?

Mr. BYE. I would concur with Mr. Ambro. The separation of powers clearly limits the judge's role to that of being a judge and not

attempting to go beyond that and legislate vicariously through decisions.

Chairman HATCH. Thank you. I have other questions, but I think I will submit them in writing and I would ask you all to answer them as quickly as you can.

Let me turn to Senator Biden. You have got to forgive me. I have got to make a phone call.

QUESTIONING BY SENATOR BIDEN

Senator BIDEN. I won't be very long, Mr. Chairman, because you have asked very good questions and touched on some of the areas. I might note for the record that old expression "what is one's meat is another man's poison." I have just filed a lengthy amicus brief in the Supreme Court on my behalf to attempt to sustain the legislative position I took when I wrote the Violence Against Women Act and on the issue of a civil rights cause of action. The fifth circuit has overruled that in a case involving a college co-ed and three students.

The interesting thing there is it depends on which side of the coin you are looking at, from the conservative or liberal side, which

the press likes to view it. I have a drawback. I teach separation of powers at Widener Law School, and I have been doing that for a while and it has become that old joke, if you want to learn it, teach it.

I find it interesting that this Supreme Court, in my view, is moving back toward what I would call a Lochner era rationale for their interpretation of section 5 of the 14th amendment in not giving deference to a rational basis for congressional action and deciding, as they did in the Lochner era, that we do not believe it meets the goals.

For example, if you remember those early cases, there was a case where the Court concluded on a matter relating to the safety of workers that although they did not disagree with the legislature's right to impose limited hours and certain work conditions, they concluded that those conditions would not promote the health and safety of the workers. Well, it is not the Supreme Court's business to determine what would promote health and safety. Their business is to determine whether or not we overstepped our bounds in basic constitutional law.

Now, my friends and others who are-by the way, the Senator from Utah, unlike many, is a serious constitutional scholar. I mean, this is not a hobby with him. He is a first-rate trial lawyer, but he also is one of the people here who has taken the time to hone his skills as a constitutional scholar, and it is real. He and I disagree on it.

He is very concerned that you don't overrule State legislative decisions, but not very much concerned about the Federal court overruling congressional decisions based on the power of the enforcement of the Commerce Clause and other things. So I am not going

to ask you any of those questions, except to state that it depends on which side of this you are looking at. And I find that moderates and liberals are equally as inconsistent as conservatives are in their interpretation of the separation of powers doctrine as it relates particularly to what constitutes the enforcement mechanism of section 5 of the 14th amendment.

But it does lead to me one question I want to ask each of you, and that is what your view-What is your definition of stare decisis? What is your notion of the degree to which you are bound, and how much leeway do you have? As I teach the course I teach, I think there is a very different standard we should apply as Senators in determining whether or not you go on the appellate bench or on the district court compared to what you do on the Supreme Court.

On the Supreme Court, you are not bound by anything, so I have an obligation, in my view, to understand much more clearly what your methodology for interpreting the Constitution is. I am satisfied, if there are men and women of integrity in front of me and

they can rationally explain their view of stare decisis and what precedent they are to follow, that they will be men and women of honor and be bound by what they concluded, regardless of their political disposition and regardless of their methodology they would apply on the Supreme Court.

That is why I find it no problem to vote, as I have, for someone for the circuit court of appeals and vote against that same person for the Supreme Court of the United States when they have been put forward because I think there are different rules of the road.

But I would like to hear, moving this time from right to left, what you believe to be your obligation under your view of what stare decisis is?

You two guys are going up, with the grace of God and the goodwill of the neighbors and 51 votes, to the circuit court of appeals in your various circuits. Is your obligation different, and where do you look?

Mr. BYE. I really don't think that it is greatly different. I heard somebody refer to a circuit court judge as being a colonel. I think I would make it more akin to a master sergeant, perhaps, at best. But be that as it may, circuit court judges obviously have somebody to look to and respect and abide by rulings, and that, of course, is the Supreme Court.

The proposition of stare decisis is really the glue that makes our whole system of justice work for the benefit of society, and it is really an important element upon which-

Senator BIDEN. How about in a situation where there is no case on point in your circuit? For example-and I am not asking you how you would rule on this; I want to make this clear. For example, there are conflicting decisions in the circuit on the Violence

Against Women Act on the civil rights cause of action. If there is not any precedent in your circuit-there now is, but if there is not any precedent in your circuit and there is no Supreme Court judgment that has been made do you have an obligation to look to the other circuits to see how they rule?

Mr. BYE. I would do that for sure.

Senator BIDEN. Well, why would you do that? You are not bound, are you, by the other circuits? I mean, if the ninth circuit or the first circuit ruled one way-in this case, for example, the fifth circuit had no problem ruling differently than two other circuits had

ruled. Are you bound by it? Would you look to it? Are you bound by it? I mean, can you be more specific for me?

Mr. BYE. I would be persuaded by it.

Senator BIDEN. Mr. Bye, are there any circumstances under which you as a circuit court judge are appropriately able to overturn a precedent within your own circuit that has never been appealed to the Supreme Court?

Mr. BYE. I don't believe so.

Senator BIDEN. Well, I think you do have that authority. I hope

You will take a look at that. I am not suggesting you overrule anything, but I would propose that if there is no other case on point

and the only ruling is in your circuit, it seems to me that it is fully within your authority, and consistent with stare decisis, to be able to overrule a judgment in your own circuit that has not been confirmed by the Supreme Court.

Mr. Chairman, again, I thank you, and I want to state something for the record here. There has been argumentation occasionally made, Mr. Chairman, if you have a chance to just listen to this one point, that this committee under your leadership has been reluctant to move on certain people based upon gender or ethnicity or race. And I know there are other potential nominees for the third circuit.

I want to make it clear and go on the record. I make no apologies and I take a back seat to no person in this body for my promotion

of the interests of all Americans, particularly minorities. As a matter of fact, my other appointee was a minority that you put

through.

I have found in my experience with you that there is absolutely no distinction made by you, other than what the record states. And it may be unusual for you all to hear me say this, but I want to say it in an open forum, with the press listening, because I know that in acceding to my request, which I think is totally appropriate since it was clear as a bell-well-qualified by the ABA, as most of the nominees are, et cetera-you have moved, and I just want to make it clear that anyone who raises the issues of whether or not you are moving based upon-you are a little too conservative on who you like and don't like, but in my experience with you that has not a single thing to do with gender or race. I just want the record to show that. I realize I will get political heat for saying that, but it happens to be true, and so I want to thank you.

Chairman HATCH. Well, thank you, Senator Biden. There have been attempts by some to politicize this process and criticize the Judiciary Committee. Frankly, I think we have done a pretty darn good job under the circumstances. We are down to about 62; after you, there will be about 57.

Senator BIDEN. I just wish you had the same influence on the floor of the Senate.

Chairman HATCH. That is right. Well, we get it done. It sometimes takes longer than I care to, but we get it done.

But we are down to basically a full judiciary, and we have 20 vacancies that don't even have nominees. And that has been true all

through this presidency, and every presidency for that matter. One thing that I have tried to do is never worry about a person's race or gender, just do the best you can for everybody. In fact, we never tell people on the floor what race a person may be. We think it is irrelevant to this process, or at least I do.

But it is always a heated process. Senator Biden went through unholy hell when he was chairman of this committee on judges.

Senator BIDEN. That is why I am doing foreign relations now.

Chairman HATCH. Yes; it is safe to say I go through unholy hell,

but we try to do a good job and we try to make sure that people are treated fairly. There are all kinds of nuances to this particular jurisdiction of this committee and all kinds of nuances on the floor that I can't always control. But so far I think we have been able

to control a lot of things that have worked out for the betterment of this administration and its nominees.

In particular, I think this is a particularly good panel of nominees, and I am proud of each one of you and proud of the records

that you have established and the things that you have been able

to do with your lives. You all have qualifications that I think justify your selection to these positions, and I will do my best to see

that we try and get you through.

If we finish tonight, you won't make it until the first of the year.

Senator BIDEN. "We" meaning the Senate.

Chairman HATCH. I am talking about the Senate.

Senator BIDEN. I think you are safe.

Chairman HATCH. I don't think we are going to finish tonight. We may not be able to get you all through before the end of this year, but you will be up shortly after the first of next year, and we will certainly bring you up in committee.

With that, I just want to commend each of you for having these nominations. It is a tribute to each of you and to the careers that you have and to the work that you have done and the reputations that you have established. We expect Federal judges to be beyond politics. We expect them to be people who uphold the law in every way and who interpret the laws, not make the laws. That is a cliché that is easier said than done, and we expect you to do justice.

And if you do that, then politics has no role in it.

We would like to try and get people who basically feel that way on the courts. Regardless of personal ideological beliefs, you are going to have to uphold the law, and if you do that, you are going to have a very strong supporter in me.

So with that, we just want-

Senator BIDEN. Mr. Chairman, may I make one last comment?

I apologize. It is the prerogative of the chairman to make the last comment, but I want to thank your families. This falls on deaf ears for the public at large because they look at your appointment for life and they look at the salary and it is more than the average American. It is the same salary, basically, that we make.

But for many of you-and I don't know each of your financial backgrounds, but it is all in the record. It is confidential-most of you are making a significant sacrifice, making the judgment to go on the bench-and I want to thank your families for being supportive of you doing that.

I realize to my dad, \$150,000 a year, roughly, is a king's ransom.

And it is a lot of money, I acknowledge, and I make no complaint about we don't make that much. I make no complaint about that.

But the public should know that the bulk of the people that come before us here are trading in jobs where they are making multiples of 2, 5, 10 and 15 times that much money.

I think you and I may be closer in age, Mr. Bye, but most of you are pretty young and you are coming at a time when your earning power is on the rise, not on the decline. And we thank you for doing it, and thank your families for allowing you to engage in public service as you have.

So that is the only point I wanted to make, Mr. Chairman.

Chairman HATCH. Well, thank you, Senator Biden.

I join in Senator Biden's nice comments, and we are really happy to have had all you family members and friends here as well today.

I think you have added a lot to this hearing. Even though you have not spoken, the fact that you have been here tells us a lot and that is important as well.

Thank you all for being here. We will try and move these as quickly as we can and we want to compliment each and every one of you on your nomination.

Mr. BYE. Thank you, Mr. Chairman.

BONNIE CAMPBELL
THURSDAY, MAY 25, 2000

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:00 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Jeff Sessions presiding.

Also present: Senators Grassley and Schumer.

OPENING STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. The committee will come to order.

Our first panel will be Senators and Congressmen who may be introducing nominees, and we would be glad to have them have a place at the table and come up. We will start with the circuit nominee and then go according to the list Senator Hatch has given me,

or any other agreement you might have on your time, I would be glad to try and accommodate you.

Senator Grassley is a distinguished member of this committee.

Senator Grassley, we are glad to have you here and we would be delighted to hear your comments at this time.

STATEMENT OF HON. CHARLES GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Well, I want to introduce Bonnie Campbell. She is a nominee for the Eighth Circuit Court of Appeals, and that includes Iowa.

Ms. Campbell has broad experience in a number of areas of law, both private and public. Her private practice experience spanned a period of over six years, during which she primarily focused on issues relating to family and employment discrimination law.

Ms. Campbell's public service began in 1974, when she worked for former Iowa Senator John Culver. Then in 1990, after practicing in the private sector, she was elected Iowa's Attorney General. Her tenure as Attorney General provided Ms. Campbell an opportunity to become familiar with the workings of the Federal appellate court system, serving as counsel to all State agencies in the prosecution arm of State government in cases appearing before Federal appellate court.

Ms. Campbell has personally monitored and participated in a number of cases that have appeared before the Eighth Circuit she is nominated for. As Attorney General of the State of Iowa, she also aggressively prosecuted drug dealers and stalkers. In addition, she championed victims' rights and tougher domestic abuse laws.

Bonnie Campbell left the Attorney General's Office in 1995.

President Clinton appointed her as the first Director of the Violence Against Women Office in the U.S. Department of Justice, and

she is serving in that position this very day.

As the Director of this Office, she is responsible for working with U.S. attorneys to ensure enforcement of the new Federal criminal statutes contained in the Violence Against Women Act and related legislation seeking to transform the way in which the criminal justice system responds to violent crimes against women.

Ms. Campbell's stance on tougher domestic abuse laws and the aggressive prosecution of drug dealers has earned her nomination the endorsement of the Iowa State Police Association, the largest police association in the State of Iowa.

I thank you, Mr. Chairman, for this hearing, and you will also hear from my colleague, Senator Harkin, in support of this nomination as well. Senator SESSIONS. Thank you very much, Senator Grassley. Those remarks will be important for the record, and your support for this nominee as a leading member of this committee will be most important.

Senator Harkin, I don't believe is here yet. I will go down our list. Senator Schumer is not here.

Senator Schumer is our ranking member. Does he have a statement now? And then we will hear from Representative Morella.

STATEMENT OF HON. CHARLES SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you very much, Mr. Chairman, and I just want to thank Senator Hatch, as well as my committee mates, for again helping New York with our judicial needs.

I want to thank our ranking member, Senator Leahy, for working so hard on behalf of so many of the nominees. Behind the scenes, Senator Leahy has worked quietly to help all of us move our nominees. And sometimes he doesn't get as much credit as he should,

so I want to thank him publicly for everything he has done.

Senator SESSIONS. Thank you very much.

I see Senator Harkin is on a short timeframe, and Senator Cleland.

Senator CLELAND. I yield to my colleague.

Senator SESSIONS. The Senator from Iowa.

STATEMENT OF HON. TOM HARKIN, A U. S. SENATOR FROM THE STATE OF IOWA

Senator HARKIN. Thank you, Mr. Chairman. I appreciate that. I am on the floor now as a co-manager with Senator Lugar on the crop insurance bill, and I wanted to take the time to come over here. So I appreciate my colleague, Senator Cleland, letting me go ahead.

Senator SESSIONS. We both care about that bill.

Senator HARKIN. I know we do. I have got to get back to handle that.

Mr. Chairman, I am here obviously on behalf of a friend of 20 years, Bonnie Campbell, for the eighth circuit.

Mr. Chairman, it is my honor to be here to introduce and give my support to an Iowa constituent and, as I said, a friend of over 20 years, Bonnie J. Campbell, who has been nominated for the U.S. Court of Appeals for the Eighth Circuit. I believe she would serve in this position with honor and fairness and distinction.

Bonnie Campbell has had a long and distinguished service to our country. First, she has a deep appreciation for Congress and how we operate because she started her career here back in the 1970's with our former colleague, Senator John Culver. After law school, she started in 1984 with a private practice in Des Moines, where she worked on cases involving medical malpractice, employment discrimination, personal injury, real estate, and family law.

She was then elected attorney general of Iowa in 1990, the first woman to ever hold that position in our State. She managed in that position an office of some 200 people, including 120 attorneys handling a wide variety of criminal and civil matters for State agencies and officers. As attorney general, she gained high marks

from all ends of the political spectrum as someone who was strongly committed to enforcing the law, to reducing crime, and to protecting consumers.

In 1995, she was appointed as the Director of the Violence

Against Women Office in the Department of Justice. In that position, she played a critical role in the implementation of the violence

against women provisions of the 1994 Crime Act. Again, she has

repeatedly won respect from a wide range of interests with different points of view on this issue. She has been, and remains, responsible for the overall coordination and agenda of the Department of Justice's efforts to combat violence against women.

As I said, Mr. Chairman, I have known Bonnie and Ed Campbell for over 20 years. She is a person of unquestioned integrity, keen intellect, and outstanding judgment. She also has a great sense of fairness and evenhandedness. These are the qualities I believe, and her significant experience, that make her an ideal candidate for this important option.

Her nomination has been strongly supported by many, many of her colleagues, including the current Iowa attorney general and the president of the Iowa State Police Association, and the approval of the American Bar Association.

Finally, I might just add, Mr. Chairman, we do need a judicial system that truly reflects the diversity of this Nation. We need more women who are qualified on the bench at all levels. So for all these reasons, Mr. Chairman, I urge you and the committee to promptly report her nomination favorably to the floor of the Senate.

I know that Bonnie Campbell is here today with her husband, Ed Campbell-again as I said, two longtime and close personal friends of mine. I have admired them both greatly through the years for their service to our country, to their local community, and to our State of Iowa. You couldn't find a better person to serve in this position on the court of appeals than Bonnie Campbell, Mr. Chairman.

Senator SESSIONS. Thank you very much, Senator Harkin. We appreciate those comments and they will definitely be considered by this committee.

Senator HARKIN. I appreciate that. Thank you, Mr. Chairman.

Senator SESSIONS. Thank you.

Our Judiciary Committee today is holding its fifth nominations hearing of the second session of the 106th Congress. We will hear from one Justice Department nominee, one judicial nominee who has been nominated to be a U.S. circuit judge, and three judicial nominees who have been nominated for U.S. district judges.

We will have three panels this afternoon. The first will consist of the sponsors of the nominees. We have just had that. Then the

second panel will consist of Mr. Daniel Marcus, who has been nominated to be Associate Attorney General. Our final panel will consist of the judicial nominees Bonnie J. Campbell, of Iowa, to be

U.S. Circuit Judge for the Eighth Circuit; Jay A. Garcia-Gregory of Puerto Rico, to be U.S. District Judge for Puerto Rico; Beverly B. Martin, of Georgia, to be U.S. District Judge for the Northern District of Georgia; and Laura Taylor Swain, of New York, to be U.S. District Judge for the Southern District of New York.

Chairman HATCH. If we can have Ms. Campbell, Mr. Garcia-Gregory, Ms. Martin, and Judge Swain come to the witness table, I will

be glad to swear you all in.

If you would raise your right hands, do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help

you God?

Ms. CAMPBELL. I do.

Chairman HATCH. Thank you.

Do any of you have any statements you would care to make? We will start with you, Ms. Campbell, then Mr. Garcia-Gregory, then Ms. Martin, and then Ms. Swain, and please introduce your family members or any guests or friends that you have with you.

TESTIMONY OF BONNIE J. CAMPBELL, OF IOWA, TO BE U.S. CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT

Ms. CAMPBELL. Thank you, Mr. Chairman. I don't have a statement, except to thank you for the opportunity to be here. I would

like to introduce my husband, Ed Campbell, sitting right there.

Chairman HATCH. Ed, we are glad to have you with us.

Ms. CAMPBELL. And I have many friends and colleagues from the Violence Against Women Office and others with whom I work who are here, and I thank them, but I certainly won't introduce all of them.

Chairman HATCH. Well, we are thankful to have all of you here. As one of the coauthors of the Violence Against Women Act, we are happy with the work that you are doing, and we are going to try and get it right this time, although I felt the Supreme Court should have gotten it right itself, but you never know.

Ms. CAMPBELL. I appreciate your support always.

Chairman HATCH. Thank you, Ms. Campbell.

Well, thank you so much. We are proud of you

and proud to have all of you here, and we look forward to questioning you and asking some questions to you that I think need to be asked.

I will just ask across the board here, in general, Supreme Court precedents are binding on all lower courts, and circuit precedents are binding on the district courts within any particular circuit. Are you committed to following the precedents of the higher courts faithfully and giving them full force and effect even if you personally disagree with such precedents?

Ms. Campbell, you are up for the eighth circuit, and the rest of you are up for district court judgeships.

Ms. CAMPBELL. Well, the answer is short. Absolutely.

Chairman HATCH. OK.

What would you do if you believed the Supreme

Court or the court of appeals had seriously erred in rendering a decision? Would you nevertheless apply the decision or would you

apply your own best judgment on the merits?

Ms. CAMPBELL. I would follow the precedent, as well.

Chairman HATCH. That is good. Take, for example, the Supreme

Court's decision on Monday in *United States v. Playboy Entertainment Group, Inc.*, where the Court struck down a provision of the

1996 Telecommunications Act that was designed to protect children from exposure to sexually explicit adult programming on television.

That was a 5-4 decision.

The bill required cable operators who offer sexually explicit material to fully scramble their signals or show such programming

only between 10 p.m. and 6 a.m. The Court said that violated the

first amendment's free speech guarantees. The Court held that another section of the same law requiring cable operators to inform

subscribers that they will completely block objectionable if asked to

do offered an equally effective and less restrictive means to achieve the same goal.

I presume you will follow the precedent, even though you may or may not agree with it. Anybody who won't?

[No response.]

You have stated that you would be bound by Supreme Court precedent and, where applicable, the rulings of the Federal circuit court of appeals for your district. There may be times, however, when you are faced with cases of first impression.

What principles will guide you or what methods will you employ in deciding cases of first impression?

Ms. CAMPBELL. It is difficult to improve upon what has already been said because I agree with it. I would look to the Constitution, the statute, the plain meaning of the statute, any Supreme Court or circuit court precedents, and apply the law as well as I can.

Chairman HATCH. Thank you. Now, please state in detail your best independent legal judgment on the lawfulness under the Equal

Protection, Clause of the 14th amendment in Federal civil rights laws of the use of race, gender, or national origin-based preferences

in such areas as employment decisions--that would be hiring, promotion, or layoffs--college admissions and scholarship awards, and

the awarding of government contracts.

Now, I think I should note that the Supreme Court has held that any race-based classifications at either the Federal or State-level

are to be examined under the strict scrutiny standard. Under this

standard, the classification must be justified by a compelling government interest. The Court has mentioned that providing remedies to those who have directly suffered discrimination meets this

test, but that an interest in, curing widespread societal pressures or achieving diversity does not.

Shall we start with you, Ms. Campbell?

Ms. CAMPBELL. The Adarand case, as you described it, is clearly

controlling law. Any remedial statute would have to be very narrowly tailored to promote a compelling state interest, and any review of that by a court would apply a strict scrutiny test. I think

that is a very, very tough standard.

Chairman HATCH. All right. Now, do any of you have any legal or moral beliefs which would inhibit or prevent you from imposing or

upholding a death sentence in any criminal case that might come before you as a Federal judge? Do any of you have any-

Ms. CAMPBELL. No.

Chairman HATCH. All right. That is a tough one because we all have differing views on these types of things, but we have to apply

the law.

Do you believe that 10-, 15-, or even 20-year delays between conviction of a capital offender and execution is too long? What do you

think?

Ms. CAMPBELL. I am beginning to feel like I am a copy-cat here. I think it was the goal of Congress with the habeas corpus reform

to speed up this process.

Chairman HATCH. Well, it was a Hatch-Dole bill, the Antiterrorism and Effective Death Penalty Act, that basically said we are tired

of these long delays. And we want to treat people fairly, but there should not be frivolous appeals. We gave them basically one trip up

through the State courts and one trip up through the Federal

courts, and unless there is an absolute proof of innocence, the sentence has to be carried out.

It takes about 3 or 4 years to go through that process, but we

have been talking about 10-, 15-, 20-, 25-year delays, with frivolous appeal after frivolous appeal, and some of the lower court judges have made mockery out of the system.

Now, let me ask this question. We will start with you, Ms. Campbell. The Supreme Court, through a process of so-called selective

incorporation, has applied most, if not all, of the provisions of the Bill of Rights against the States. Thus, for instance, the First Amendment, which originally was intended to apply only to the Federal Government, has been applied to the States. The Second Amendment, however, which protects the rights of law-abiding citizens to own firearms in this country has not. Do you believe the Second Amendment ought to be applied to the States?

Ms. CAMPBELL. I don't have a vast knowledge of Second Amendment law, but I can assure you that if that question came to me

in a case or a controversy, I would look to the Supreme Court for guidance.

Chairman HATCH. All right.

OK; let me go to you, Ms. Campbell, and just ask

you a couple of questions. Under what circumstances do you believe

it appropriate for a Federal court to declare a statute or an act enacted by Congress unconstitutional?

Ms. CAMPBELL. Well, one would hope that would be very rare and only if there were Supreme Court precedent which one would be required to follow.

Chairman HATCH. Are you aware of the Supreme Court's recent decision in United States v. Morrison and its 1995 decision United

States v. Lopez? And if you are, please explain to the committee your understanding of these decisions and their holdings regarding congressional power.

Some commentators have accused the Supreme Court of judicial activism because of their decisions in these cases. Do you agree or disagree?

Ms. CAMPBELL. I don't think I would fool you at all, Mr. Chairman, if I told you that I wasn't familiar with those cases. Of course,

I am. It is my understanding in both Lopez and U.S. v. Morrison that the Supreme Court requires a truly economic activity before Congress can rely upon the Interstate Commerce Clause to pass a law in an area, if I haven't too grossly oversimplified which was what I thought a very lengthy decision by the Court, especially in Morrison. As a circuit court judge, I know you understand, if I am fortunate enough to be there, that I would have to follow the law handed down in those cases.

Chairman HATCH. There have been nine major cases now on federalism and those two are two very interesting cases on federalism

that have been highly criticized by some. Every one of them has been a 5-4 decision, as you know. It will be interesting to see how that finally sifts out.

Well, I think we have asked enough questions here. There are a lot of other questions, naturally, we could ask, but I am very proud of all four of you having this opportunity to be nominated for these very important positions. They are lifetime positions and they are among the most important positions in the world.

At least from my standpoint, the Federal judiciary is the one branch of Government we have counted on to save the Constitution

through all these years, and we are going to continue to count on you folks as you serve on your respective benches to do the very best you can to keep our country free and to abide by the rule of law, which is very poorly understood by many other nations, but is very well understood here. You have all given excellent answers to these questions.

Let me just say this, that Senators Leahy and Moynihan have statements for the record.

The record will remain open until the close of business on Friday for additional written questions from Senators.

When we get these questions to you, I hope you will answer them as quickly as possible so that we will have those in the record.

I don't see any other Senators here. So, with that, we will recess until further notice, and we wish you all the best.

Thank you.

Ms. CAMPBELL. Thank you.

ERIC CLAY

WEDNESDAY, MAY 7, 1997

U.S. SENATE,

COMMITTEE ON THE JUDICIARY,

Washington, DC.

The committee met, pursuant to notice, at 2:07 p.m., in room SD-116, Dirksen Senate Office Building, Hon. Spencer Abraham presiding.

Also present: Senators Ashcroft, Sessions, Durbin, and Torricelli.

OPENING STATEMENT OF HON. SPENCER ABRAHAM, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator ABRAHAM. We will come to order. Let me just make some preliminary comments. We are checking right now to see whether or not we may have this proceeding continue in the absence of a member from--oh, great; we can proceed without a member from the Democratic side. We think Senator Torricelli will be joining us fairly soon.

Let me just begin by welcoming everybody today. We are going to be having a hearing on the nominations of four individuals for Federal judgeships: Eric Clay of Michigan for the Sixth Circuit Court of Appeals; Arthur Gajarsa of Maryland for the U.S. Circuit judgeship or the Federal Circuit; Alan Gold of Florida to be a U.S. District Judge for the Southern District of Florida; and Thomas Thrash of Georgia to be U.S. District Judge for the Northern District of Georgia.

Let me just quickly outline that because we have votes slated to begin somewhere around 2:15 today and we have a number of Senators who are here to introduce people from their States, what I

thought we might try to do was to have the introductions occur in roughly the order we just said of the various nominees and then probably break, if we can get that done in time, and I guess that means all of us who are doing introductions will have to be brief; take a break at that point and then come back and we will begin on an individual basis, going through questions of the different applicants.

Let me also just welcome the families and friends of those who are here today. Having had a number of folks from my State over the years go through this process to be nominated and finally reach this point, we know that this is not just a very difficult and tough process for the applicant; it is also certainly for the nominee's family and friends, a process that involves a lot of difficult times.

So we will ask you, if you would like, either now or later when you come back here, to please feel free to introduce anyone who is with you, that has accompanied you here today.

We have been told that they might keep the board open for us a little extra here, so if we make these statements succinct, we will be able to proceed when we come back with Eric Clay and go forward.

For purposes of information, we will take a brief recess at this time so that we can go cast our votes. There are two roll call votes that have to be cast, so it may take a few minutes before we are able to reconvene, but we will do so once that is over with, at which I will be introducing Eric Clay to the committee and we will then begin the process of question rounds.

So the committee stands in recess.

[Recess.]

Senator ABRAHAM. We will now resume our hearing. I notice the ranks have thinned somewhat since we took off, but nonetheless we appreciate everybody who is here and everybody who has agreed to stay.

At this point I am going to ask Eric Clay if he will come forward to the table and I am going to begin with an introduction of Mr. Clay. Then we will proceed right to questions with him and then go on in the order we had originally set.

STATEMENT OF HON. SPENCER ABRAHAM, A U.S. SENATOR
FROM THE STATE OF MICHIGAN

Senator ABRAHAM. Every once in a while you have these moments in your life which are sort of, I guess the expression *deja vu*,

and in this case I was thinking about that, but this really is history repeating itself because somewhere, I think almost a year ago, I believe in early April 1996, we had a hearing here in which I was

the presiding officer and Mr. Clay was here from my State of Michigan as a nominee for the Sixth Circuit Court of Appeals and we unfortunately are here again because while we succeeded in getting that nomination through the Judiciary Committee, it was not acted upon by the full Senate. So, Mr. Clay, welcome back, although I wish we did not have to do this again.

I just want to say on behalf of myself and Senator Levin that we both support this nomination strongly. Mr. Clay is an excellent candidate. He is a Phi Beta Kappa graduate of the University of North Carolina, then attended and graduated from Yale Law School. He has clerked, interestingly enough, on the sixth circuit itself for Judge Damon Keith, which I gather was one of the reasons

that you came to the Midwest and we are happy you decided to stay in our part of the world.

He then helped form a law firm, Lewis, White & Clay, one of the most successful firms in our State, as well as one of the largest and most successful African-American founded law firms in the country.

There he has had a wide variety of experiences working on really both the plaintiffs' as well as on the defendants' sides of various matters, including a fair amount of work in the area of business law and achieved, as a consequence, extraordinarily strong respect and support within the legal community for his nomination.

He has been active beyond the legal community. Although his bar association activities are formidable, among many community service activities was his involvement in an organization called 100 Black Men, the Detroit base of that operation, a program aimed at trying to provide assistance to young people in our community with scholarships and mentoring programs.

Because of the protracted nature of this nomination process, Eric Clay and I have gotten to know each other very well and probably, I suspect, have spoken with each other more often than most members do with applicants from their State, even ones that they are

personally familiar with from prior to the nomination process. We have gotten to know each other partly before and certainly very well since, and I am really proud that you are here again and proud to have you before us as a nominee.

I respect you very much for having gone through this process as long as it has had to be. I know that while we might not agree,

as I said at the last hearing, on everything in terms of judicial decisions or philosophy, I think that that would be the case with anyone who was an applicant for this position.

But I now know Eric Clay very well and can say with certainty that he is an excellent nominee, he will be an excellent addition to the sixth circuit, and I am proud to support him.

I also wish to just add that Senator Levin wished to be here

today, but unfortunately, as a member of the Intelligence Committee, there was a business meeting conducted of that committee for

exactly this time, assigned late in the process, so he couldn't be

here. He has submitted just a note indicating that he, too, supports

Eric Clay as someone who will bring to the bench broad experience

and intelligence of mind and make a fine addition to the sixth circuit. I believe Senator Levin will also be submitting a formal statement into the record, which we will include here in the hearing.

Senator ABRAHAM. So Mr. Clay, welcome again to the Senate Judiciary Committee and hopefully this time will be successful to the

final stages of the process.

At this point what we will do is now move into the question

phase of our hearing, and so what I would like to do is to ask you

to raise your right hand and we'll swear you in. Do you solemnly

swear that the testimony you are about to give will be the truth,

the whole truth, and nothing but the truth, so help you God?

TESTIMONY OF ERIC L. CLAY, OF MICHIGAN, TO BE U.S.

CIRCUIT JUDGE FOR THE SIXTH CIRCUIT

Mr. CLAY. I do. Thank you, Mr. Chairman. I am glad to be here.

Senator ABRAHAM. Nice to have you.

Mr. CLAY. I would just like to introduce two friends who are here with me, if I might.

Senator ABRAHAM. Please.

Mr. CLAY. Nancy Gist and Patsy Riley. I very much thank them for being here.

Senator ABRAHAM. If they are here and would like to stand up, we welcome you. We are glad to have you here at the hearing, as well.

If you have some opening statement that you would like to make, please do so.

Mr. CLAY. Mr. Chairman, I do not have an opening statement.

I would be pleased to answer the questions of the committee.

QUESTIONING BY SENATOR ABRAHAM

Senator ABRAHAM. Thank you very much. What I would like to do is just ask a couple of basic questions and we have, with four members here, since I know a lot more about this nominee, I will limit myself to just a couple of questions.

One is this. It is always interesting to me to know what people's

view of the judicial process has been, their attitudes toward previous decisions, and I was wondering if you might comment on any

particular judicial opinion, whether in the sixth circuit or elsewhere, that you particularly admire and explain why it is one that

you think was well founded and well-conceived.

Mr. CLAY. One opinion is not a recent case-in fact, it goes all

the way back to law school-the Erie Thompkins case, which established the principle that State substantive law and

Federal procedural law will govern in diversity cases. That case was particularly

important to the history of our jurisprudence in that it contributed

to the developmental principles of federalism and made it unnecessary to develop an elaborate system of Federal common law. And

I think that case, although it may be more of interest to lawyers

than others, was a particularly impactful and important decision

that I certainly admire.

Senator ABRAHAM. Let me ask you to, if you would, look at it from the other perspective. Any particular decision, federal decision, that you would think is deserving of criticism? If so, what basis for it.

Mr. CLAY. There was a case just last year in the sixth circuit, the Lanier case, which was obviously wrongfully decided by the sixth circuit sitting en banc. The wrongfulness of that decision was eventually made clear by the Supreme Court, which unanimously reversed the sixth circuit in that case.

That was the case in which Judge Lanier from Tennessee was convicted of sexual assault under section 18 U.S.C. section 242. The sixth circuit felt that there was an absence of due process because there was not sufficient notice to the public of the exact nature of the offense and all the circumstances had to be explained or notice provided in advance for that to constitute an offense under section 242 and the Supreme Court unanimously reversed, indicating that based upon Bevins and some of the other decisions, that there was sufficient notice by way of analogy and that the sixth circuit opinion was at variance with a long line of Supreme Court decisions.

I think, even though I am from the sixth circuit, that was a rather embarrassing episode and I think that is the one that stands out most in my mind.

Senator ABRAHAM. Thank you. We will make sure your criticisms are not passed on to the judges on the sixth circuit.

At this point I am going to suspend any further questions and, first of all, welcome Senator Torricelli and Senator Durbin. We appreciate folks coming by today. This is kind of a lonely spot up here

so I am glad to have others join us, and I'll turn to Senator Torricelli if he has any questions.

QUESTIONING BY SENATOR TORRICELLI

Senator TORRICELLI. Thank you very much, Mr. Chairman.

Let me say, before addressing Mr. Clay, how glad I am to see these nominees before the committee today. We are now facing 98 vacancies in the Federal bench. More than 11 percent of the entire Federal judiciary remains vacant. The Attorney General, before this committee only a week ago, spoke about the consequences on the administration of justice if this Senate does not begin to produce confirmation of Federal judges.

This is indeed a welcome event but as serious as the situation is, indeed these vacancies could rise to 110 in another month if indeed we do not succeed today, not only in having you address the

committee, asking you questions, releasing your name for consideration by the floor, but actually proceeding to consideration.

So with the understanding that the length of my questions will not further delay your confirmation, permit me just for a moment to ask a couple of things.

I have a great concern for the Federal judiciary that as we seek the best of scholarship and professional credentials, that Federal judges also have both real life experience and some practical understanding of the system of Government in our society.

We have all witnessed, particularly as a former member of the House of Representatives, that the Federal judiciary clearly did not have a concept of congressional redistricting, how the law would

impact. Indeed, we saw it again this last year on congressional financing of campaigns. In the midst of the campaign, the Federal judiciary changed the rules, I suspect considerably to its regret, and bears some responsibility for the chaos of campaign finance in the 1996 cycle.

Tell me about your own sense of life experience and your practical knowledge of the functioning of this Government and our society that makes you a good Federal judge.

Mr. CLAY. Senator, I have been very involved in the profession and in issues that have real life consequences that arise, that are important to the administration of justice. There are a number of organizations that I belong to in which we have addressed issues that are important to the administration of justice.

I have had a long service on the local rules advisory committee of the U.S. District Courts for the Eastern District of Michigan. I have been a director of the Detroit Bar Association for a number of years.

Senator TORRICELLI. But outside the profession, for example, have you been involved in your communities, so you know how your town works, so you understand civic organizations' work, have an understanding for the process by which your community or State is governed outside of the profession?

Mr. CLAY. Senator, there have been a number of involvements I have had there, including one mentioned by the chairman, my involvement in the organization of 100 Black Men. There have been

literally dozens of young men who I believe through this organization in my local community have been rescued from a life at risk,

possibility of delinquent behavior, not doing well in school, no male role models in their lives.

Senator TORRICELLI. How long have you been involved with 100 Black Men?

Mr. CLAY. Approximately 4 years, ever since we have had a chapter in the Michigan-Detroit area.

Senator TORRICELLI. I know the organization. It is a very fine organization.

Give me your sense of as you approach the interpretation of congressional actions, the tools by which you reach legislative intent

and the deference to congressional actions. There has recently been

a debate about how controlling or even relevant the views of sponsors of legislation might be and how the Federal judiciary should

look at that individual sponsor's comments versus the comments of

the larger House of Representatives or Senate in reaching interpretation. What would be your own views on that question?

Mr. CLAY. As far as the judiciary is concerned, we certainly, if I am fortunate enough to be confirmed, would have to give great deference to the process of legislative decisionmaking, to legislative

intent, to upholding, if there are any constitutional challenges, legislation of the State legislatures and the Congress, if there is any

possibility or theory under which that legislation can be upheld.

I understand that it is not the judiciary's function to substitute its judgment and values for that of the people speaking through its legislature, and one watchword of all of those in the judiciary is that of restraint. And I would hope that if I were fortunate enough to be confirmed, that I would provide due deference and would similarly restrain myself and appreciate the gravity of legislative mandates and be duly respectful of those.

Senator TORRICELLI. Thank you. Mr. Chairman, I have no further questions.

Senator ABRAHAM. Thank you very much, Senator. I would just point out that before you arrived I had made the point with respect to this nominee that not only do I support him strongly, but we went through much of this process last time. So I have been disappointed that we haven't had his nomination through to conclusion and confirmation.

At the same time, I think it is important to indicate that of the 99 vacancies which we have before us today, there are 73 instances where there have been no candidates sent to us, no nominees. We have 26, I guess, which are now before us and of the 26, 4 which obviously we are dealing with today, there are 8 on the court of appeals, 2 of whom we are seeing today. Two others, I guess the full paperwork isn't before us, either, so hopefully that part of the process can be expedited, as well, so that we can begin to address some of these.

At this time we will turn to Senator Ashcroft.

Senator ASHCROFT. Thank you, Mr. Chairman. I want to thank Mr. Clay for coming before us. Thank you for making yourself available.

Mr. CLAY. Thank you for having me.

Senator ASHCROFT. Are there any issues that might come before a member of the Federal appellate bench with which you are in such substantial personal disagreement that you don't feel you could render a verdict or a judgment that comports with the law, that you would feel like you had to overrule on the basis of your own feelings?

Mr. CLAY. No, Senator. There are no issues that I am aware of that could be presented with respect to which I could not follow the law and enforce the law.

Senator ASHCROFT. Would that include capital punishment?

Mr. CLAY. That would include capital punishment.

Senator ASHCROFT. There are those who feel like the responsibility of the judiciary is to fill in blanks that are left by the failure

of the executive branch or the legislative branch to act. I think Professor Fletcher in California at Bolt Hall has written that when

those branches are in chronic default, there is in the judiciary discretionary power to act.

How do you view discretionary power of the judiciary? And at what points would you feel like it would be appropriate to fill in the blanks?

Mr. CLAY. Well, I don't think it would be appropriate to act where there appears, in my own personal opinion, to be a void. There may be a void because the people, through their legislature assembled, simply may not want to take action with respect to that matter. It would be presumptuous of me to speculate as to why the legislature has not taken action.

And even if there is, in my own personal estimation, a real need for something to be done in a particular area of endeavor, it is not my function, if I am fortunate enough to be confirmed as a judge, to make that determination. It is not the function of the judiciary to legislate simply because a judicial officer may think there is a need. I understand that that is not what we would be there for.

Senator ASHCROFT. What is the most important right you can think of that is not secured by the Constitution? Can you think of any?

Mr. CLAY. I honestly cannot think of any right that is not secured by the Constitution. I mean, it may be a mental

lapse I am

having at the moment, but I cannot think of any.

Senator ASHCROFT. Is that because you think that the Constitution is flexible enough to cover every situation or it is just that you

cannot think of a specific right that you would like to see that the Constitution doesn't already cover?

Mr. CLAY. There is nothing that I have by way of proposal for any alterations in the Constitution, Senator. I don't have anything to offer in that regard.

Senator ASHCROFT. You have had a notable journey through academic with an outstanding record and you served as a clerk in the circuit, I believe.

Mr. CLAY. Actually, I was a law clerk to Judge Damon Keith at the U.S. district court before he went on the circuit court.

Senator ASHCROFT. It appears to me that you have been focused at the trial court level and I don't have writings of yours or addresses that you've given. How would you say that we should be

assured that you are of the timber or the disposition to be an appellate court judge?

Mr. CLAY. Senator, for 24 years I have built a practice. There are approximately 40 attorneys-the number fluctuates-in our firm.

During my 24 years of practice I have been the chairman of our litigation department, with responsibility for overseeing all trials and appeals. I have tried dozens of cases. I have taken innumerable ones of those cases to appeal, both in Federal and State court.

In addition, I have supervised all the appellate work that has been done in my firm for 24 years. I feel very comfortable at both the trial and appellate level. In fact, I think my trial work would make me a better appellate judge. I know what happens in a courtroom and when these matters come to the court of appeals, I think

that gives me a comprehension and an insight that perhaps some of the judges at the appellate level who have not done much litigation would not have.

And I might add my clients have been very satisfied with the results that we have obtained for them.

Senator ASHCROFT. Are you keeping time, Mr. Chairman?

Senator ABRAHAM. We weren't but now that-

Senator ASHCROFT. Now that I've gone this far, you have decided to?

Well, let me just wrap up with one question. You have practiced before the Federal bench substantially and before the State courts. How much deference would you give to State court judges based on your experience in the State courts?

Mr. CLAY. Well, as the Senator is aware, an enormous amount of litigation and an enormous amount of business passes through the State court system. The significance of that system is inestimable. We simply couldn't do without it. Most State judges, both at the trial and appellate level, with whom I am acquainted are outstanding people who are doing outstanding work, and they are entitled to the same consideration and deference that we accord judges at the Federal level.

Senator ASHCROFT. I thank the chairman for the time. I kept looking for the red light.

Senator ABRAHAM. I appreciate that, Senator. We appreciate your questions.

We will now turn to Senator Durbin.

QUESTIONING BY SENATOR DURBIN

Senator DURBIN. Thank you.

Mr. Clay, you put yourself in a very extraordinary position with your testimony by deciding not to suggest an amendment to the Constitution. Virtually every Senator, every witness, all of the staff people here and most of the people walking by this room propose at least one amendment to the Constitution on a weekly basis, and they all call themselves conservatives. I think you chose the wiser course.

Mr. CLAY. Thank you, Senator.

Senator DURBIN. I am glad you are here today and I am glad that you have returned and stuck with this process. You were caught up in a political slowdown last year, in an effort to delay the appointment of judges to the Federal judiciary, and it caused, I am sure, a great deal of problems for a lot of people. I hope it didn't cause too many for you.

I hope this committee will meet its constitutional responsibility this year and I hope that you will be one of the early people confirmed.

This last weekend I met a woman who is the chief judge of the juvenile court in Atlanta, GA. Her name is Glenda Hatchet, amazing woman, 9 years in private law practice with Delta Airlines and

then convinced to take a seat on the juvenile court, and she is becoming a national leader on these questions dealing with juvenile crime.

She talked about the day-to-day challenges of a judge facing juveniles charged with crimes, some serious and some not, and about

the frustration that she faced because of state restrictions on disposition of cases.

As a Federal judge you would face similar restrictions when it comes to sentencing guidelines. They have been the subject of a lot of debate. In fact, at least one member of the Federal judiciary has resigned because of these guidelines, saying that he felt that he couldn't discharge his responsibilities on the bench because of congressionally imposed guidelines.

I would like to know what your thoughts are about sentencing guidelines and what you would be inclined to do if you felt, in any given case, that the guidelines recommend a sentence that was either too harsh or too soft.

Mr. CLAY. Discretion has its benefits but as I understand the guidelines, they were devised to provide some consistency and some predictability and, by so doing, some fairness. But in any event, it is not my task to decide if the guidelines are proper or working properly or if I like them or not. That task belongs to Congress. I have no difficulty with the guidelines. I have no problems in enforcing the guidelines. If I was resistant to complying with the sentencing guidelines, I think it would be incumbent upon me not to present myself for this position.

So I have no problems following the guidelines. If I disagree with the outcome in a particular case, I would still enforce the guidelines so long as the sentence is legal and in conformance with the guidelines.

Senator DURBIN. I was about to ask you about the disparity in sentencing between crack and powder cocaine, which is a tough question that each member of this panel has had to deal with in their votes on the floor. I'm not going to do that because I don't think there is an easy answer to it. I have not found one. But it does call into question some very serious concerns about the equal administration of justice in this country and also dealing with this epidemic of drug crime that we have.

Thank you for being here today. I wish you the best of luck.

Mr. CLAY. Thank you, Senator.

Senator ABRAHAM. Thank you, Senator.

Finally, Senator SESSIONS.

QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. Thank you, Mr. Chairman. I appreciate your sharing your opinions and values on this nominee and your confidence in his abilities.

That and other information I have heard, I think you should be proud of and your academic record is good.

Mr. CLAY. Thank you, Senator.

Senator SESSIONS. I think it is good.

You know, Senator Ashcroft asked a little bit of your philosophy about the Constitution and the law and it is a troubling thing to, I think, a lot of people in America today that by reinterpreting the meaning of words, you can, in effect, amend the Constitution in a way not provided for within the document itself.

So I think to that degree, we have seen some of that in the past and I think there is a concern that if we want to amend the Constitution, let's do it straight up. I think Professor Van Alstyne at

Duke-you have heard of that place, haven't you, Duke?

Mr. CLAY. I was born in Durham, NC, so I know about Duke.

Senator SESSIONS. I notice you went to the University of North Carolina.

He was saying one time in an address to the 11th circuit annual conference that what we must affirm and be true to is this Constitution of the United States; we ordain and establish this Constitution for the United States, not one we wish had been adopted, not that we would like it to be but the one that we have, the good and bad parts, he said, and I think that is a challenge for us all and I think you will be true to that challenge. Otherwise we don't have a rule of law; we really don't. And that is important.

Let me ask you a few practical questions about handling the job on the court of appeals. Do you have any philosophy about oral argument, in what percentage of cases you might think it would be appropriate to have oral argument?

Mr. CLAY. Yes, Senator. I know this is an age in which judicial economy is at a premium. The public, the legal profession and the judiciary are all looking for ways to speed up cases and to cut costs and even at the level of the U.S. Court of Appeals, some of the circuits now have a settlement apparatus, have settlement attorneys

convening the attorneys for the opposing sides to see if cases can be settled in advance of briefing and oral argument.

But notwithstanding that and those efforts to expedite matters, I think it is very valuable to have oral argument in as many cases as possible to give the attorneys an opportunity to plead their cases, not only in their written papers but orally before the bench, realizing that for most people who come before the court of appeals through their attorneys, this is their very last chance. The Supreme Court takes so few cases that the courts of appeals are actually the courts of last resort for most litigants.

Keeping that in mind and realizing the importance of the court and its proceedings, I would never want to do anything to disturb oral argument. In fact, I would like to have as much of it as we could.

Senator SESSIONS. I have enjoyed oral argument as a federal prosecutor, as an assistant U.S. attorney and U.S. attorney for almost 15 years. I came to believe that a lot of cases

really don't need

it. And in private practice, of course, that lawyer is billing his client, and if you have an oral argument, you know, you may need

a week to get prepared, not to mention counting the clerks and the time of the courts and all of that.

So I would encourage and have developed the philosophy over the years that if the issues are clear, go on and rule. A good lawyer ought to be able to put it on paper. And if the facts are complex or other things, I think some efficiency is important because the people of this country are getting turned off on law. One reason is it costs so much and takes so long.

Mr. CLAY. The senator's remarks are well taken and I don't disagree with them. I don't mean to suggest that every case needs oral

argument. There are a lot of frivolous cases.

Senator SESSIONS. Some judges seem to believe every case should. I am glad to hear you say that.

Mr. CLAY. There are a lot of frivolous appeals. There needs to be a screening mechanism. I don't mean to suggest that all cases need to be argued. The court may benefit from a number of cases but certainly not all of them being subjected to oral argument.

Senator SESSIONS. One of the interesting things I have noticed as a prosecutor is the number of lawsuits that get filed against police officers and sheriffs deputies and some of it is really developing an expertise to get the prosecutor and the law enforcement on the defensive in the course of a trial. Historically, there were many defenses that could be asserted to take out lawsuits that didn't meet the proper standards for being in court.

Would you be willing to apply those standards as they are written and dismiss lawsuits that did not, for various jurisdictional or other reasons, should not be there? Do you have any hesitation to dismiss cases on technical reasons, such as statute of limitations or jurisdictional questions?

Mr. CLAY. Well, not at all. I mean, if the case shouldn't be there, is not legally entitled to be in court, no matter who the litigants are or what the matter concerns, it simply is not entitled to be there, whether it's a police brutality case. No one category of case is entitled to greater or lesser deference than another category of case, just based on the nature of what the case happens to be.

Civil rights cases, where people are claiming constitutional violations, certainly need to be looked at closely, but if the statute of

limitations is a bar, it is simply a bar.

Senator SESSIONS. I think that is correct. Sometimes I feel that judges in any number of kinds of cases are just curious. They want to know about it and let the case continue beyond what the law would require and I think we just have to enforce the law, good and bad. That is the way I see it.

Again, I would like to congratulate you on this important nomination. The courts of appeals are marvelous institutions. They form

a tremendous part of our great judicial system. If we strengthen them-and nourish them, I think they will continue to be a bulwark for freedom and liberty, and I wish you the very best.

Mr. CLAY. Thank you, Senator.

Senator SESSIONS. Thank you, Mr. Chairman.

Senator ABRAHAM. Thank you, Senator. I would just note, Senator, that Senator Torricelli and I thought that your idea about the

possibilities of limiting oral arguments could be equally applied in the legislative branch, so we are going to put together a little rule change which we would like your help with here.

Senator SESSIONS. Some of the senior Senators, if they would sign onto it, maybe I would be interested.

Senator ABRAHAM. I think you can tell by who is here today that they won't.

But in any event, Mr. Clay, thank you again for being here. As I said earlier, I regret that we are doing this a second time but hopefully it just has been another opportunity for our colleagues to understand the quality of the nomination and I am confident that the Judiciary Committee will be as supportive this time as we were a year ago.

And so again, thank you and I am very glad to have been a supporter of this nomination.

Mr. CLAY. Thank you, Mr. Chairman.

TIMOTHY DYK
THURSDAY, JULY 16, 1998
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:04 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Mike DeWine presiding.

Also present: Senators Feinstein and Durbin.

OPENING STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR
FROM THE STATE OF OHIO

Senator DEWINE. The hearing will come to order.

Let me first apologize to those of you who are standing and those who are out in the hallway. These hearings don't usually attract quite this much attention.

We do have a full agenda today. We have eight different nominations. What we are going to do is to break this down into three

panels. We will start with the Members of Congress who are here, and we will just start right away.

It is my understanding, Senator Feinstein, you and, I guess, Congressman Mack both have to leave.

Senator FEINSTEIN. I don't know Congressman Mack, but I know Senator Mack.

Senator DEWINE. I am sorry. Senator Mack.

[Laughter.]

Well, you know, he and I were Congressmen together.

Senator FEINSTEIN. Congressman Mack was named after a stadium.

Senator DEWINE. We were Congressmen together for a few years.

Senator Kerry.

STATEMENT OF HON. JOHN F. KERRY, A U.S. SENATOR FROM
THE STATE OF MASSACHUSETTS

Senator KERRY. Mr. Chairman, thank you very much, Senator

Durbin. It is my great pleasure to introduce to the committee Timothy Dyk, who has been nominated by the President to serve on the

U.S. Court of Appeals for the Federal Circuit.

Mr. Dyk is an outstanding candidate in every respect, Mr. Chairman. He was born in Massachusetts, left the State for a period of

time, and then returned to go to undergraduate school at Harvard, graduating in 1958, and subsequently to Harvard Law School, from which he graduated in 1961, having served on the Harvard Law Review. His ties to Massachusetts go considerably further back, all the way to the Pilgrims. After law school, he came to Washington for one of the most privileged law experiences, as we all know, serving as a clerk on the Supreme Court. He worked there with Justices Reed and Burton and did such an outstanding job, he was asked by the Chief Justice to serve for another year as the Chief's law clerk.

He then continued public service as the special assistant to the Assistant Attorney General for the Tax Division, moved into the private sector where he served for some 25 years at the distinguished law firm of Wilmer, Cutler and Pickering here in Washington. He specialized in communications law and in litigation and during that time somehow found time to serve as an adjunct professor of law at the Georgetown Law Center, at the University of Virginia Law School, and also the Yale Law School.

Since 1990, he has been a partner at the Washington office of Jones, Day, Reavis and Pogue where he served as chair of the issues and appeals section, a litigation group, and I might say that as part of his work, he has briefed and/or argued a number of cases before the Federal Circuit for which the President has nominated him and is therefore very knowledgeable about the various subject matter within its jurisdiction.

I also know that he has over the years appeared before 10 of the 13 Federal courts of appeals around the country, and he has argued 8 times before the Supreme Court of the United States. So he

really comes before the committee with, I think, about as complete and distinguished law career as one could find.

He is accompanied today by a good friend of mine, his wife, Sally; two of his children who I might introduce, Caitlin, who is sitting in the second row back, and Abraham, his son, who got his red hair, I am told, from Miles Standish back in Massachusetts; and

his granddaughter, Rebecca, is somewhere lurking around behind there.

Joining him from Rochester, NY, are his sister and brother-in-law, Penelope and Anthony Carter, and I am very, very privileged

to introduce his mother, Ruth, who is here, also a graduate of a Massachusetts college, Wellesley College, and she just recently celebrated her 97th birthday.

Senator DEWINE. Welcome. Thank you.

[Applause.]

Senator KERRY. I don't know whether to give the credit to Wellesley or Massachusetts or something else.

Mr. Chairman, just as an aside, I would say that within the breadth of all of that experience, he actually has had some appellate experience. He recently served as a supreme court justice at

his son's high school moot court, and he heard his own son, Abraham, argue the opposing side to the one that he had argued before

the court of appeal and that he had won. He had the great judgment and wisdom to abstain in the vote, and Abraham's argument

carried the day notwithstanding. So maybe you can find out how he would have voted had he voted.

He has found time for a significant number of public service efforts outside of just practicing law. I am told his favorite one of

those, Mr. Chairman, is serving as a coach to the Little League team, which he has continued to do even after his son had graduated from it, and graduated into being the assistant coach with

him. So I think this is an individual committed to public service who has long wanted to serve on the court system of the country, and who is embraced by the Chamber of Commerce, the National Association of Manufacturers, a host of groups of broad, bipartisan nature, and there is no question in my mind that the President has nominated a person of outstanding capacity who will contribute to the judicial system of the country.

Senator DEWINE. Senator Kerry, thank you very much. I appreciate that.

That completes our first panel. Let me invite our second panel to come up and I will introduce you as you are coming up.

Senator DURBIN. Mr. Chairman, I am sorry to interrupt you, but while you are introducing them, if we could place in the record statements from Congressman Bobby Scott as well as the minority

leader on this committee, Senator Leahy.

Senator DEWINE. They will be made a part of the record of the committee.

Senator DURBIN. Thank you, Mr. Chairman.

Senator DEWINE. The second panel consists of Timothy Dyk, of the District of Columbia, to be U.S. Circuit Judge for the Federal Circuit; Judge David R. Herndon, of Illinois, to be U.S. District Judge for the Southern District of Illinois; Judge Rebecca R. Pallmeyer, of Illinois, to be U.S. District Judge for the Northern District of Illinois; and Judge Jeanne Scott, of Illinois, to be the U.S. District Judge for the Central District of Illinois.

I invite you to continue to stand and raise your right hand,

please. Would you please state your name, do you swear the testimony you shall give in the hearing shall be the truth, the whole

truth, and nothing but the truth, so help you, God?

Mr. DYK. I do.

Senator DEWINE. You may be seated.

Let me again welcome everyone here today and welcome particularly the families of the nominees. Sometimes we have to state the

obvious, or sometimes it is helpful to state the obvious. This is, as you all know, one of the steps in the process of becoming a Federal judge. It is, in a sense, the tip of the iceberg. We do not have, particularly with eight people here today, the opportunity to ask extensive questions. We hope our questions are relevant. We hope they are somewhat, at least, probing. But it is only the tip of the iceberg.

As the nominees know, they have already gone through a long process to get here. They have already spent a great deal of time filling out a very lengthy and probing questionnaire and they have answered a number of questions. So the public part of this is what we are seeing today. As the nominees know probably better than anybody else, there has been a long process to get here and there will be a process beyond this, of course, as well.

Let me just start, going from my left to right, and start with Mr. Dyk and ask each one of you to make any kind of statement that you would like to make. If there is anyone in your family who has not been introduced, now would be a great time to do that, and if you want to introduce them a second time, that will be fine, as well. Mr. Dyk, we will start with you and then we will just proceed right down the panel.

TESTIMONY OF TIMOTHY B. DYK, OF THE DISTRICT OF COLUMBIA, TO BE U.S. CIRCUIT JUDGE FOR THE FEDERAL CIR.

CUIT

Mr. DYK. Thank you, Senator. I would like to first thank the committee for giving me a hearing. I appreciate that very much, and just briefly, I would like to say that I regret that my father, Walter Dyk, is not here today. He died a number of years ago and it would have been a privilege to have him. I would like to thank my family and my colleagues from Jones Day and my colleagues for coming here today and I will spare the committee further introductions.

Senator DEWINE. I appreciate it very much.

QUESTIONING BY SENATOR DEWINE

Mr. Dyk, let me start with you, if I could. In a 1994 Federalist

Society roundtable discussion entitled, "Do We Have a Conservative Supreme Court," do you recall making statements about Justice Scalia's plain meaning approach to interpreting laws as being

conservative, but a more expansive analysis as being moderate? In your response, you also stated that, "The notion is that Congress speaks only through the words of the statute and that this is a mechanical approach." You further explain that, "A Senator or a Congressman is much more likely to read the committee report than the legislation itself, so the committee report could actually be more reliable than the words of the statute." I wonder if you would be so kind as to elaborate on this response.

Mr. DYK. Surely, Senator. I do recall the statement, and obviously, as a subordinate Federal judge, I would follow the Supreme

Court's direction to rely on the plain language primarily. I do agree with that completely. At the same time, I think sometimes cases get into a bit of a dueling dictionary, and under those circumstances, I think it is appropriate often to look at the central purpose of the legislation, as the Supreme Court did, for example, this last term in the Moscarello case involving the question of whether carrying a firearm would include carrying a firearm in the vehicle, and after reviewing the dictionaries and press statements, the Court finally concluded that, yes, it did encompass carrying the firearm in the vehicle because the purpose of the statute was to require the criminal to leave his gun at home. So I do think that statutory purpose and background do have a role to play as to legislative history, but I certainly agree that the primary meaning of the statute is to be gleaned from the plain language that Congress uses.

Senator DEWINE. And that recent Supreme Court decision, again, just to clarify for me, demonstrates to you what?

Mr. DYK. It demonstrates to me the importance of looking at the purpose of the legislation, which in this instance was to cause the criminal to leave the gun at home. So any ambiguities in the meaning of "carry" were resolved in favor of broader construction of the statute, which would punish having a gun in the car.

Senator DEWINE. I wonder if we could take this one step further and talk about a case that might be before you that was a case of

first impressions where there was not Supreme Court precedent and there was not circuit precedent, I wonder if you could describe for us your process of analysis. You have done this a little bit, but I wonder if you could just elaborate on it.

Mr. DYK. Surely, Senator. Obviously, if there were a case in point from the Supreme Court or from the circuit, one would follow that, but if there were not. I would look to analogous precedent in the Supreme Court and in the Federal circuit, the other circuits, and if it were a statutory construction case, I would look at the language of the statute and go through the process that I have just

described to you. If it were a constitutional case, I would look at the language of the Constitution, at the principles embodied in the Constitution, and at prior precedent in an attempt to resolve the case in the narrowest possible way, because I think, as I also said in that Federalist Society panel, I think judges need to be very careful not to write more broadly than is necessary.

Senator DEWINE. It sounds like that was an interesting panel.

Mr. DYK. It was a wonderful panel. Judge Bork was there and others, yes.

Senator DEWINE. Let me just, if I could, continue on this train of thought and ask you another question about that same panel. You made the following statement. I will ask you if you recall it. If you want me to put it in better context, I will. I think I have the transcript here. Let me just give you a quote and ask if you

could maybe expand on it.

"Roe and the flag burning cases reflect a moderate Court in the area of civil constitutional law." I wonder if you could explain, what did you mean by that?

Mr. DYK. Well, I think the reference to the flag burning case was following the earlier precedent in that area, in that I think I characterized moderate jurisprudence, conservative jurisprudence, as following the precedent, and I think the same thing is true with respect to the Court's decision to rely on stare decisis in relation to the Roe case. Having that precedent on the books, it was appropriate to follow it, and that was the view I was expressing.

Senator DEWINE. You have expressed some strong opinions in regard to the issue of cameras in the court. You have been involved in that.

Mr. DYK. Yes, for many years.

Senator DEWINE. Yes. I have some interesting quotes from you, and I just wonder if you could just tell me where you think we should go in this area. You have already expressed your opinion about it, but I would like for you to elaborate a little bit and explain what public policy advantages you see in opening up the Federal courts to cameras.

Mr. DYK. Senator, the Supreme Court, of course, told us in the Richmond newspapers case and later cases about the importance of openness in the judicial system and how that served not only to educate the public, but even more important, that it served the system itself. Along that line, I think that having cameras in the

courts allows the public that cannot visit the court, that does not read about it in the newspapers, to see the functioning of the judicial system, and I have always thought it was critical that the public understand how the system functions, for good or bad, and that having the cameras there gives information to a wide body of the public that would otherwise not receive it.

Senator DEWINE. One of the counterarguments might be--and I must say, Mr. Dyk, I happen to agree with you, just as an aside, sort of irrelevant to the question--but one of the counterarguments that is made is that cameras in the courtroom change conduct. Judges act differently. Lawyers act differently. Jurors might act differently. How do you react to that?

Mr. DYK. Well, those concerns, of course, have been expressed, and genuinely so, by many people. The experience in the State courts, which have had cameras in many States for a number of years, has been that the judges who have presided at those trials, who have had the experience, have thought that there was not an adverse effect on trial participants and that, indeed, having cameras there can make the judges, the witnesses, the jurors, the lawyers behave better than they otherwise would.

Senator DEWINE. Better?

Mr. DYK. Better.

Senator DEWINE. Let me--go ahead.

Mr. DYK. I am sorry, Senator. I think that few judges would go to sleep with a camera in the courtroom.

[Laughter.]

Senator DEWINE. One never knows. One never knows. Strange things do happen.

Let me just conclude--and then I will turn it over to Senator Durbin, along this line, on a quote that you made which I think is particularly interesting. This is your quote and your words.

"In times past in this country, people who wanted to find out about a case could

go down to the courthouse and watch and learn. That is not feasible anymore. Now, people who want to watch the Federal courts will be confined to secondhand reports.”

I think that expresses it very well.

Mr. DYK. Thank you, Senator.

Senator DEWINE. Senator Durbin.

QUESTIONING BY SENATOR DURBIN

Senator DURBIN. Thank you, Mr. Chairman.

Mr. Dyk, let me say at the outset, I had an interesting experience a week ago. I was last Saturday in Lake Forest, IL. A mature

lady came up to me and said that she had always been fascinated with politics and if she had been born 20 years sooner, she would have been a candidate. I said, well, can I be so bold to ask your age, and she said, "I am 87 years old." I said, oh, congratulations. She said, "Well, I am a Wellesley grad, you know, and we live a long, long time." It is a testament to your mother and her presence here today and it says something about Wellesley. I never heard it before, and now I have two living examples to point to.

I would like to ask, since I am so familiar with the Illinois nominees and I have talked to them about this, I really would like to

ask, for the record, about a case which I think would go to some of the questions asked by the chairman. Probably the most-notorious, outstanding, noteworthy, you pick the adjective, law case of

our generation was the O.J. Simpson trial. Driving around the city of Chicago, every cabbie had it on the radio, following it every day, and people have gone back and forth in their opinions about what it meant and what it said.

I would like to ask each of you, as aspiring judges or as sitting judges, what lessons did America learn from the O.J. Simpson trial? Mr. Dyk.

Mr. DYK. Well, I think that, contrary to the views of many people, that having the O.J. Simpson trial on television did teach the

public some important lessons, and I think one of the lessons that it taught the American public is the importance of a judge controlling the judicial proceedings, and that did not happen to the extent

that it should have in the O.J. Simpson trial.

I think it taught the American public about the importance of having fairness in proceedings, fairness on the part of the prosecutor, fairness on the part of the defendant, and that they saw that

the jury could reach a verdict which many people disagreed with.

I think it brought into the public arena debates about the jury system, about how prosecution should be conducted, how defense lawyers should conduct themselves, and I think that was very, very important.

Senator DURBIN. Thank you. Mr. Dyk, you kind of started at the top here according to your resume, your first assignment as a clerk in the U.S. Supreme Court to three Justices, including the Chief Justice, so you have seen judicial temperament at many different levels. What are your thoughts about it when you are confirmed?

Mr. DYK. Well, that first experience helped humble me, Senator Durbin, and I completely agree with you. I think it is very, very important for a judge to remember that he or she is a civil servant.

That is exactly what judges are. They have a job, just like the postman. The postman delivers the mail. Judges decide cases that come

before them. I think if you lose sight of that, you really do not belong on the bench. I think it is absolutely essential to be as courteous as possible to everyone, to remember that you have a job to

do, to be a jobist, in Justice Holmes' words, and to do the best you I possibly can at all times and to have people who will keep you humble. I am sure my little league team will help with that.

Senator DURBIN. Mr. Chairman, we can now say to the attorneys of America, we have them all on the record. Thank you very much.

Senator DEWINE. Senator Durbin, thank you very much.

Mr. Dyk, you have been nominated to be a circuit judge for the Federal circuit. Can you tell me why you want that job? For some of us, looking at the jurisdiction, we might think it might not be the most interesting job. What prepares you for it, but also, why do you want it?

Mr. DYK. Senator, I have always wanted to be a judge and I think the Federal circuit is a wonderful court. I have had the honor to practice before that court a considerable amount in the last few years. I think I have argued five times before it. I have briefed other cases. I guess I have always been in my practice someone who has found a patent case to be as interesting as a first amendment case. In each instance, there is a challenge
Senator DEWINE. It sounds like you are in the right court.

[Laughter.]

Mr. DYK. I think there is a challenge to understand the case, and I think the Federal circuit presents particular challenges because I think the cases are difficult, they require a great deal of time and attention, and I would enjoy it and I would particularly enjoy being part of a process and trying to make that process work in the best possible way.

Senator DEWINE. Objectively-trying to stand back from your experience practicing in that court-what are the qualities that, as

a litigant or as a practicing attorney in that court, you would look for in a judge of that court?

Mr. DYK. I think a commitment to work through the difficulties of the cases, to understand them, I think to try to create a situation where the reversal rate of district courts is less than it is now.

I have heard percentages like a 53-percent reversal rate, which-

Senator DEWINE. Really?

Mr. DYK. [continuing] Which would be extraordinary by other circuit standards and there is something lacking there in communication, I think, when that happens.

One of the things that I think that court should strive for is perhaps more emphasis on settlement. It does not have a mediation

program now, unlike many of the other circuits. I had experience with the eighth circuit mediation program recently and it was excellent and resulted in a settlement.

Senator DEWINE. Thank you very much.

Mr. Dyk, Chairman Hatch has asked me to ask you a series of questions, which I am now about to read to you. These are questions that Senator Hatch would like for you to answer. In *Phillips v. Washington Legal Foundation*, the Supreme Court recently ruled that so-called IOLATA interest funds which pool small client trust accounts to earn interest must follow the principal deposited in those accounts. While it is hardly a novel ruling

that interest follows principal, there has been considerable debate over whether the use of these accounts constitutes a taking. Do you have any comments with respect to this case or the takings issue the fifth circuit will soon need to address?

Mr. DYK. My firm has been involved in that case, though I have not been personally. It is a very important case. It presents a very difficult issue, and I think the whole takings area is becoming more

and more important and it remains quite complex, as I think the takings issue in that particular case will be on the remand. There is an argument as to whether the Penn Central factors should be followed or whether those can be dispensed with, and I think there is a certain lack of clarity in the law and that we would all benefit from further Supreme Court decisions on that subject.

Senator DEWINE. As you know, many modern takings clause cases involve so-called regulatory takings. When confronted with a regulatory takings case, what basic principles would you apply in determining whether a taking has occurred?

Mr. DYK. I think the job of a junior Federal judge on the Federal circuit, first of all, is to follow the Supreme Court, and in the Lucas case and in the Dolan case, the Supreme Court has given us considerable guidance as to how to approach that. But the regulatory takings issue is a very important question and it seems clear that if the entire economic use has been destroyed as a result of the regulation, that there in many circumstances is going to be a claim.

What is not so clear and needs to be clarified is what is the situation if the regulatory action does not deprive the owner of the entire economic use. Of course, Justice Scalia has suggested there may be differences between land and personal and a wide variety of factors that need to be considered.

Senator DEWINE. In your opinion, should the normal presumption of constitutionality that is given to statutes and regulations apply to such regulations that give rise to potentially compensable takings?

Mr. DYK. Well, if I understand the Supreme Court correctly and the Chief Justice's remark in the Dolan case, that there is under these circumstances not a presumption of constitutionality but that it has to be approached on a de novo basis.

Senator DEWINE. Finally, the Bill of Rights in large part protects citizens from government excesses or abuse. The first amendment, for example, prohibits government from regulating our speech or forcing us to worship in any particular fashion. Similarly, the fifth amendment prohibits the government from, among other things, forcing us to testify against ourselves. That amendment, of course, also prevents the government from taking our property without just compensation.

You have engaged in considerable first amendment litigation in your practice. Could you identify for us the similarities you see, if you think any exist, between the first amendment's protection of speech and the fifth amendment's protection of private property?

Mr. DYK. Well, the Chief Justice has himself addressed that question, suggesting that both provisions are in the Bill of Rights and that both provisions deserve special attention as a result of that.

Senator DEWINE. I have two additional questions from Senator Thurmond. So even though there are only two of us up here-
[Laughter.]

Mr. Dyk, I understand that you have been a member of the board of directors of People for the American Way for many years. Please explain why you joined the board of directors and, generally, your interest in this organization.

Mr. DYK. I was invited to join the board of directors in the aftermath of a litigation that I became involved in through

People for the American Way. I thought that People for the American Way did some interesting and important things. I did not agree with everything that People for the American Way did. In fact, one of my early experiences with the organization was to have a very heated debate within the organization about whether the People for the American Way should continue to endorse the fairness doctrine. My own view was then and continues to be that the fairness doctrine is unconstitutional and People for the American Way endorsed it. I think it is a valuable organization. I think it was a valuable organization. I did not agree with everything it did.

Senator DEWINE. Let me follow up. Senator Thurmond's next question covers this to some extent, or you have already covered it a little bit, but I want to get more particular. Senator Thurmond asks, are you aware of any cases taken or amicus briefs filed by the People for the American Way while you were on the board of directors that you did not agree with?

Mr. DYK. Well, certainly the position in the fairness doctrine cases where they were on the other side from me in litigation was a primary example of that. The board was generally not asked to pass on whether particular cases should be filed. It was a board of about 50 people. Those decisions were made by the president of the organization and sometimes in consultation with the executive committee.

Senator DEWINE. It was actually just made by the president?

Mr. DYK. Most of them were just made by the president, and if he had something particularly difficult, he would consult with the executive committee. I was not a member of the executive committee.

Senator DEWINE. It was not an amicus committee, or I mean, it was just basically the president?

Mr. DYK. Well, the president in consultation with his staff, including the litigation director, but there was no amicus committee or anything like that.

Senator DEWINE. Senator Durbin.

Mr. DYK. Senator, could I clarify just one answer I gave to you?

Senator DEWINE. Absolutely.

Mr. DYK. I would not want to leave my colleagues in the Federal Circuit with the impression that the reversal rate was 53-percent overall for the entire court. I was referring to intellectual property cases. I do not think I made that clear.

Senator DEWINE. Thank you very much. I appreciate that.

The record will remain open. The procedure of the committee is that you may receive additional written questions from members of the committee, so you can be prepared for that possibly occurring. The record will remain open for additional questions until the close of business tomorrow, July 17.

We thank the second panel very much.

Mr. DYK. Thank you.

RAYMOND FISHER
THURSDAY, JULY 29, 1999
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:06 a.m., in room SD-628, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Specter, Feinstein, Schumer, Smith, Torricelli, Sessions, Leahy, and Feingold.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. If we could begin. Today, we are holding a hearing for seven judicial nominees: two Circuit Court nominees and five District Court nominees.

This hearing follows the committee's approval of 16 judicial nominations earlier this year. We have three panels today. The first panel will consist of the sponsors of the nominees who will give brief statements on behalf of their nominees. The second panel will consist of the two Circuit Court nominees, and the third panel will consist of the five District Court nominees.

Before we turn to the panels, the Ranking Member is not here, but we will reserve time for him to make his opening remarks when he arrives.

Let me just say we are very pleased today to have the two Senators from California speaking on behalf of two of our judgeships here today, and we will turn to you, Senator Feinstein, first, and then you, Senator Boxer, second.

Please.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Chairman HATCH. I would also invite Mr. Campbell to the table, too. We normally do not have the House Members speak, but you are still in the fabled Judiciary Committee over there.

Mr. CAMPBELL. No, I am a graduate.

Chairman HATCH. You are not there anymore. You are just the expert in antitrust over in the House. So we are certainly going to give you an opportunity to say something.

Mr. CAMPBELL. Thanks, Mr. Chairman.

Chairman HATCH. Senator Feinstein.

Senator FEINSTEIN. Thank you, Mr. Chairman, for holding this hearing today.

It is my pleasure to introduce the Associate Attorney General Ray Fisher to the Judiciary Committee as a nominee for the Ninth Circuit Court of Appeals.

I think, by any standard of measurement, Ray Fisher should be counted as a superlative nominee. Prior to his appointment as Associate Attorney General, he was considered one of the top trial lawyers in Southern California. His legal skills are so highly regarded that he was recently inducted into the American College of Trial Lawyers, an honor bestowed on only the top 1 percent of his profession.

His academic record is sterling. He graduated from Stanford Law School in 1966 where he was president of the Stanford Law Review and awarded the Order of the Coif.

Following law school, he served as a law clerk for Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia Circuit and Supreme Court Justice William Brennan.

During his 30-year career in private practice, Ray Fisher specialized in the toughest of cases,-complex civil litigation and in alternative dispute resolution. In 1988, he founded the Los Angeles office of Heller, Ehrman, White and McAuliffe, an office that has grown from 6 attorneys to 48. The majority of his court appearances have been before the Federal courts.

Ray Fisher has an impressive history of public service. During the turbulent times in Los Angeles after the Rodney King verdict, he served an invaluable role as Deputy General Counsel to the Christopher Commission which reviewed the actions of the Los Angeles Police Department. He also served on the Los Angeles Police

Commission for 2 years, and he was president of the commission during 1996 and 1997. His nomination enjoys the strong support of law enforcement.

The National Sheriffs Association has awarded him a lifetime membership. In addition, the Fraternal Order of Police and the National Association of Police Organizations count themselves among his strongest supporters.

It is a tribute to Mr. Fisher's civil mindedness that he left a burgeoning private practice to enter Government service as Associate attorney General in 1997. As the third-ranking official of the Department of Justice, he oversees the work of the civil litigating divisions, including antitrust, civil, civil rights, environment and natural resources divisions, and tax. In addition to these responsibilities, he has focused on expanding access to community policing and has worked diligently to bring new technology into the hands of State and Federal law enforcement.

I would like to just mention a few of the testimonials on his behalf. Los Angeles Mayor Richard Riordan writes, "As a Republican

mayor, I can assure you that Ray does not have a partisan agenda.

He is a superb lawyer, with extensive trial and appellate experience, who will use his keen analytic mind in a fair and restrained manner."

John G. Davis, a retired U.S. District Judge appointed by President Reagan in 1986, says, "I can attest that he is not an ideologue, has no agenda, and will be an intellectually honest and superior member of the court. He is dedicated to the rule of law, and is possessed of the appropriate intellect and temperament for this appointment."

The Standing Committee on Federal Judiciary of the American Bar Association has deemed Mr. Fisher well qualified for appointment as Judge of the U.S. Court of Appeals.

Mr. Chairman, I whole heartedly recommend Raymond C. Fisher for a Ninth Circuit appointment. He has truly first-rank legal credentials.

Chairman HATCH. This is high praise for these nominees coming from Senator Feinstein and Senator Specter who are Members of the Committee.

STATEMENT OF HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Thank you very much, Mr. Chairman and Members, for holding this hearing and giving us an opportunity to introduce you to two very fine Californians.

Let me first say that I want to underscore what Senator Feinstein has said about Ray Fisher. We are excited about this nomination and hope you will be as excited as we are and move expeditiously on it.

We are very proud of you, as we are of Ray Fisher, who has brought his entire family here, and we are very happy to see everyone here today. .

Thank you, again.

Chairman HATCH. Thank you, Senator Boxer.

One of the people I most respect in the House, of course, is Congressman Campbell, and we are happy to have you here. With your knowledge of the law and your professorship at Stanford, your opinion gives great weight to this committee.

We are also happy to have had the two Senators from California. They both have spoken very glowingly about these candidates. Congressman Campbell.

STATEMENT OF HON. TOM CAMPBELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Representative CAMPBELL. Mr. Chairman, you honor me. Thank you very much.

I have never come before your committee unless I knew the person I was speaking about. So I do not come all that often, and today, I know Ray Fisher and I recommend him strongly for a couple of reasons. I repay your compliment in allowing me to speak by being succinct. I hope I succeeded in that.

I came and testified on his behalf when he was up for Associate Attorney General saying that he had great promise in the management of the Department of Justice, and although I am no longer

a Member of the Judiciary Committee, I stay very active in the work product of the Judiciary Committee.

The reports are marvelous. He has been a very fine administrator in the Department of Justice. I know particularly his work

on alternative dispute resolution, where he had a background going in and where he advanced that very important policy of resolving disputes without costly litigation within the Department.

If the time ever comes and the Federal Circuits adopt that kind of approach, which we have in our Courts of Appeals in California, I think Ray Fisher might be one to do it; in other words, to use mediation on appeal, which is, of course, not the case in the Federal Circuits, but something worth considering.

Second, he comes very highly recommended. You have heard from our two Senators. I also note the strong support of former U.S. Attorney in Los Angeles, Bob Bonner, and, of course, Mayor Riordan.

Before Mayor Riordan, he was the appointee on the police commission, later chaired the police commission, and has throughout

shown a very fair and bipartisan, non-ideological, but full of ideas approach. Let me just repeat, full of ideas, but not ideological.

I have had the occasion to read his writing. He is a scholar of first order. He would have been a great law professor. Our profession lost when he chose to become a practitioner.

Last, I want to thank you, Mr. Chairman. We are short of judges on the Ninth Circuit. This has been the subject of hearings on whether we should split the Ninth because of some of the problems that we see there with delays, with reversal rates, and your holding hearings on Ninth Circuit nominees, I think, is the most important step we can presently take, short of legislation, to solve the problems that we have in the Ninth.

So I thank you for scheduling these hearings.

Chairman HATCH. Thank you, and we are honored to have you here. That is very good praise for Mr. Fisher, who I happen to also feel very deeply about and have a great deal of confidence in. So thank you for being here.

Representative CAMPBELL. Thanks, Mr. Chairman.

Chairman HATCH. We appreciate it.

We will interrupt when Senator Lautenberg comes. He is not

here yet. We will certainly accommodate him when he comes, but let me turn to Senator Schumer, who speaks for our three New York nominees.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR
FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman. I want to congratulate you for holding this hearing in the way that you have

moved these nominations along with dispatch.

I also want to express on behalf of myself and Senator Moynihan, who could not be here today, our deep thanks for you attending to New York's judicial needs. Looking at today's slate of nominees, it is clear to me that you deserve today the title of Honorary New Yorker, which I hop will serve you well in Utah.

Chairman HATCH. Listen, I am deeply honored. We Utahans have always wanted that recognition.

Senator SCHUMER. Yes, indeed.

He has many fans in New York.

Senator LEAHY. He does not even talk about being born in Pennsylvania when he goes out to Utah.

Chairman HATCH. You did not have to mention that one. I will tell you, I am proud of all three States. I just wish Vermont would be a little more supportive.

Senator LEAHY. Now, Mr. Chairman, here I am organizing Democrats for Hatch in Vermont.

Chairman HATCH. I am going to remember that.

Senator LEAHY. With those three electoral votes, I am going to put you over the top, and you diss our State like that.

Chairman HATCH. And to think, he does not even have a judgeship on this panel.

Senator LEAHY. No, but I will try to find one.

Chairman HATCH. All right.

Senator SCHUMER. All right, I am sorry I brought all that up.

Chairman HATCH. I think what we are going to do is swear in the two Circuit Court Judges and have you introduce your families, and then we are going to have to go vote. So, if the two Circuit Court Judges will come forward.

Judge Barry and the Honorable Ray Fisher, would you both raise your hands. Do you swear the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. FISHER. I do.

Chairman HATCH. Thank you.

Mr. Fisher, would you care to introduce your family?

TESTIMONY OF RAYMOND C. FISHER, OF CALIFORNIA, TO BE
U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Mr. FISHER. Mr. Chairman, I want to thank you again, for all of your courtesies, Senator Schumer, and I would like to introduce my wife, Nancy Fisher.

Chairman HATCH. It is good to see you again.

Mr. FISHER. As you know, she is a public high school teacher. My son, Jeff, is from California, also a public high school teacher, and his daughter and our granddaughter, Megan.

Chairman HATCH. Megan, you look pretty good here.

Mr. FISHER. Coming the other way behind is my daughter, an attorney, Amy Ahlers, and a very sleepy Madeleine, our granddaughter.

The CHAIMAN. Madeleine looks good.

Mr. FISHER. My sister, Debbie Fisher from Oregon, and her son and my nephew, Joaquin.

Unfortunately, Rose Fisher, Jeff's wife, and our other grandson are back in California, and Amy's husband, James, is also back in California, but are here with us in spirit.

Thank you.

Chairman HATCH. We are happy to have them all. We are happy to welcome all of you here, and we are honored to have the two of you before this committee.

I think what we are going to do and we do not have much choice, we have the reconciliation bill up, which is the tax bill, all day today, and we are going to have vote after vote after vote, but I think when we get these three votes over with, I think we will have a period of time because Senator Gramm is going to bring his amendment up and suspect that will cause quite a furor on the floor for a while. We should be able to finish this hearing after we get back, but I think rather than disconnect this hearing, we will recess until we can get these three votes over, and we will come back as soon as they are over. We will start with the two of you and then go to our five District Court nominees.

So, with that, we will recess until we can get back.

Chairman HATCH. I apologize for the delays here, but that is just the way life is around this place. So we are happy to have both of you here. We are pleased with your patience, and it stands you in good stead to be circuit judges to have this kind of patience.

Mr. Fisher.

Mr. FISHER. Mr. Chairman, equally, I thank the Chair and the committee for its attention to this matter, and am happy to be patient, not a problem. And I too would like to thank, of course, Senator Feinstein, Senator Boxer, and Representative Tom Campbell for their kind remarks.

Chairman HATCH. Well, thank you.

Mr. Fisher, when you served on the Los Angeles Police Commission, you had to deal with the relationship between police officers

and the citizens they deal with. One of the most controversial areas of police action involves searches and seizures under the Fourth and 14th Amendments. In your view, what are the most important considerations for an appellate judge to consider in reviewing the constitutionality of such a search, or any search?

Mr. FISHER. Senator, the search law is governed, of course, by a long body of Supreme Court law. And in fact, in the last term there were a number of decisions of the Court dealing with the scope of the Fourth Amendment. As an appellate judge on the

Ninth Circuit, if I were to be confirmed, I would, of course, be bound by and follow those decisions.

They tend to be-the cases tend to be fact-based, and my review of any such appeal would, of course, take into account the specific facts as found by the district court, and would, of course, also abide by the Supreme Court precedent.

Chairman HATCH. Now, for both of you, the Founding Fathers believed that the separation of powers in a government was a critical

provision protecting the liberty of the people. Thus, they separated the legislative, executive and judicial branches into three different branches of government, the legislative power being the power to balance moral, economic and political considerations and to make

law, the judicial power being the power only to interpret the laws made by Congress and by the people.

Now, in your view, is it the proper role of a Federal judge when interpreting a statute or the Constitution to accept the balance struck by Congress or the people, or to rebalance the competing moral, economic and political considerations?

We will start with you, Mr. Fisher.

Mr. FISHER. I do not think that is the proper role of a judge to rebalance or to bring his or her personal views to the matter. It is to follow the provisions of Article III, which is a limited review authority, and to be bound, as I have indicated earlier, by the applicable precedents of the Supreme Court.

Chairman HATCH. OK. Under what circumstances do you believe it appropriate for a Federal judge to declare a statute unconstitutional?

But what would you do if you believed in your

heart that the Supreme Court or the circuit court had erred in rendering a decision--seriously erred--let's put it that way--seriously

erred in rendering a decision? Would you nevertheless apply the decision on your own best judgment of the merits? You could take, for example the Supreme Court's recent decision in *City of Boerne v. Flores*, where the Court struck down the Religious Freedom Restoration Act, in part.

Mr. Fisher.

Mr. FISHER. I couldn't add anything more eloquent than Judge Barry. I agree with her statement on both counts.

Chairman HATCH. You both have indicated that you would be bound by Supreme Court precedent and, where applicable, the rulings of the Federal circuit court of appeals in your circuit. There

may be times, however, when you will be faced with cases of first impression.

Now, let me ask you what principles will guide the two of you, or you individually, and what methods would you employ in deciding cases of first impression.

We will start with you, Mr. Fisher.

Mr. FISHER. Senator, roughly the same principles Judge Barry articulated in the prior answer, although in cases of first of impression, first of all, I would want to be sure, really, after careful analysis it really was truly one of first impression. I think it is important to look at the statute involved, give it the presumption of constitutionality that it is due, certainly look for whatever--analogous precedents--if it is not directly on point, whatever analogous precedents would be guiding us from the Supreme Court. That would be the first place to look, and I think the most persuasive place to look.

Chairman HATCH. All right. Mr. Fisher, please state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness under the Equal Protection Clause of the 14th Amendment and the Federal civil rights laws of the use of race-, gender- or national origin-based preferences in such areas as employment decisions--that would be hiring, promotion or layoffs--college admissions and scholarship awards and, of course, the awarding of government contracts.

Mr. FISHER. Well, Senator, the *Adarand* decision is the most recent and binding precedent of the Supreme Court. It has articulated that in order for any kind of racial preference to be granted which it did not rule out absolutely but subjected it to the strictest scrutiny of the law, and that there must be a demonstrated compelling interest. And if there is found an exceptional case it must be

narrowly tailored to meet the specific instances involved.

So it is a very, very, very strict standard and that is the binding

precedent that, of course, if I am confirmed would govern any decision I might make.

Chairman HATCH. Now, with regard to capital punishment do either of you have any legal or moral beliefs which would inhibit or

prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a Federal judge?

Mr. FISHER. And I would answer the same.

Chairman HATCH. Let me turn to Senator Smith for any questions he may have.

Senator BOB SMITH. Thank you, Mr. Chairman. Good morning.

Mr. FISHER. Good morning.

Senator BOB SMITH. I have been frustrated over the years that I think oftentimes when people come before the committees and are asked questions about various issues, some of them controversial, it seems like the ones who don't answer them get confirmed and the ones who do don't. So I have some questions that I would appreciate you doing the best you can to answer them. I didn't hear-I came in late. Did Senator Hatch ask you if you believed in the constitutionality of the death penalty? If he didn't, would each of you answer that question?

Mr. FISHER. *Gregg v. Georgia* has held that it is constitutional. I accept that.

Senator BOB SMITH Thank you. If a judge on an inferior court other than the Supreme Court concluded that a Supreme Court precedent was unconstitutional, are there any circumstances where you could refuse to apply that precedent in a case before you?

Mr. FISHER. My answer would be the same, Senator.

Senator BOB SMITH. What about if you look at-in the *Dred Scott* case, for example, in which there was no precedent because it didn't get-it was overturned, I believe, by the 14th Amendment, but in the *Dred Scott* case where a black man was denied the opportunity to sue in Federal court because he was property, and that decision was handed down by Chief Justice Taney in a majority opinion, if that case had come before the Court and had been determined that that precedent was allowed to stand, you don't believe there would be any justification to break precedent in that case?

Mr. FISHER. Senator, as a lower inferior court judge, whether one agrees or disagrees with the Supreme Court decision, we are bound to follow that. It is up to the Supreme Court to decide when, if ever, to overrule its prior decisions.

Senator BOB SMITH. This is not 1860, and I understand that and I am not trying to be difficult here, but I want to understand something.

So if you were on a lower court in 1867 or sometime post-1867 after the *Dred Scott* case was handed down, you would have to rule, because of precedent, that a black man could not sue in your court because he was property. Is that correct?

Mr. FISHER. If that is the final determination of the Supreme Court, yes. It is up to the Supreme Court to reverse that decision.

It is not within the power of a lower Federal court to ignore binding Supreme Court precedent.

Senator BOB SMITH. Your conscience wouldn't dictate to you that you should refuse to issue such a decision and take your consequences, such as the possibility of impeachment or removal?

Mr. FISHER. Senator, I don't think that that would be the appropriate remedy for a judge. I think judges can articulate their disagreement perhaps in exceptional circumstances by writing their concerns, but they must apply the law under our form of Government and set forth by the Supreme Court. That is the mechanism

we have.

Senator BOB SMITH. And I understand that. I understand what you mean by the law, and you are correct on the precedent. But I think if you look at Plessy v. Ferguson, which was overturned by Brown v. Board of Education, here is a case where segregation was overturned, and in another case where we already talked about the Dred Scott case-these are two huge issues, slavery and the right to sue as a black person who was a slave, and also the issue of segregation where that segregation, separate but equal, was overturned.

And it seems to me that to sit-I have never been a judge, but to sit on a court and have to uphold that kind of abhorrent precedent would be something that I couldn't do. I would resign or vote the other way and take my consequences. Neither one of you would do that in that particular case?

Chairman HATCH. Of course, there is another alternative, and that is you could write a blistering disagreeable opinion expressing your viewpoint.

Would you consider doing that?

Mr. FISHER. Well, as I indicated in my prior answer, that would be the appropriate-

Chairman HATCH. While you uphold the Supreme Court, which you are bound to do.

Mr. FISHER. So, indeed, the evolution from Plessy to Brown v. Board of Education indicates that the Supreme Court itself did reconsider it after a period of time.

Senator BOB SMITH. So you would be willing to at least write a dissenting opinion, but not dissent because of the precedent?

Mr. FISHER. I would uphold the law. I would not write a dissenting opinion. Yes, I would write an expression of my concern, but again I would only do that in exceptional circumstances, Senator.

I think, Senator, I would adopt that. I think the purposes of a Federal judge in my position sitting on the-if I were confirmed to be on the court of appeals I would be bound by the Supreme Court precedent which has addressed those issues from a legal standpoint. That is what I would be concerned about. I don't think in that or other matters I should be injecting my personal views into the process.

Senator BOB SMITH. If you were a Supreme Court justice, I am assuming you would agree that a Supreme Court justice, because it is the Supreme Court, could break precedent and vote to overturn a decision such as Plessy v. Ferguson or Roe v. Wade, correct?

Mr. FISHER. The Supreme Court does have that authority and has articulated fairly restrictive grounds on which it will address prior precedent and set forth those criteria, yes.

Senator BOB SMITH. Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

We will now turn to Senator Sessions.

Senator SESSIONS. Mr. Fisher, you clerked for Justice Brennan, and I think you have previously been asked about the death penalty and Justice Brennan dissented on all death penalty cases. I don't know if he did that when you clerked for him. Did he?

Mr. FISHER. No, he had not arrived at that view at the time that I was on the Court.

Senator SESSIONS. But before he left the Court, for a number of years he and Justice Marshall and others-and they did so under

the view that the Eighth Amendment, cruel and unusual punishment-that the death penalty is cruel and unusual punishment.

And that has been rejected by the Supreme Court today and I don't think there is anyone on there that still adheres to that view.

Let me ask you, is that your view of the Constitution personally?

Mr. FISHER. My view, Senator, is that, as you indicated, the Supreme Court has ruled that the death penalty is constitutional. As

a lower appellate court judge, that is the law that I am governed by. I don't want in my judicial career, should I be fortunate enough to have one, to inject my personal opinions into whether or not I follow the law. I believe that the precedent of the Supreme Court is binding and that is what my function is.

Senator SESSIONS. Well, you will have a lot of decisions that come up that won't be absolutely clear under prior precedent. I just want to know how you think about this subject because I would like for you to say what you-you are familiar with that position of his. You are familiar that the Constitution within itself refers to taking life with due process, capital crimes which are death penalty cases.

I think it was clear that the Constitution, when adopted, contemplated that-and every State had a death penalty at that time.

So I guess my question to you is do you believe that the Cruel and Unusual Punishment Clause-personally, do you agree with Justice Brennan's view that it makes the death penalty unconstitutional?

Mr. FISHER. I don't think I agree with it, Senator, but I have not made it my work to go back and reanalyze his position. I am, as a potential Federal judge, keenly aware that the Supreme Court has ruled in *Gregg v. Georgia*, and I would apply that precedent. That would be my duty.

Senator SESSIONS. Well, you don't think you agree with it. Why would you be in disagreement with Justice Brennan on that? How would you analyze it?

Mr. FISHER. I don't-let me be clear. Justice Brennan arrived, as did Justice Marshall, at a view that was singular to the two of them. They fought that battle in the Supreme Court, as I understand it. The Supreme Court has resolved that disagreement. The

law of the land, as declared by the Supreme Court as set forth in *Gregg v. Georgia*, is the binding law of the land.

Senator SESSIONS. Well, I am aware of that.

Mr. FISHER. I know you are.

Senator SESSIONS. I am aware of that. That was flatly rejected, and it never was accepted by a majority because it was outside of any logic that I could see based on a plain reading of the Constitution. Do you have any difficulty with the statement I just made?

Mr. FISHER. I do not.

Senator SESSIONS. Mr. Chairman, my time is expired. Thank you very much.

Chairman HATCH. Thank you. I appreciate.

Senator SESSIONS. Let me just say both of these nominees have extraordinary academic backgrounds and seem to be men and women of integrity and ability, and I am pleased to see them nominated.

Chairman HATCH. Well, thank you. I am, likewise.

I have to say that it is important for people to understand that

judicial activism-that is, judges making laws rather than interpreting the laws-is wrong, whether it comes from the left side of

the table or the right side of the table. You know, a lot of people don't realize that conservative judicial activism is just as wrong as liberal judicial activism.

In particular, Mr. Fisher, on the Ninth Circuit Court of Appeals, as you know, it is very often reversed by the Supreme Court, more than 75 percent of the time, and almost 100 percent last year and some other preceding years as well. One reason that happens is because of judicial activism, judicial activism primarily from the left.

But I have to say to you that judicial activism from the right is equally heinous because if judges don't recognize the role of judging, then our Constitution won't last.

You both have answered these questions, I think, very fairly, and that is that you are going to abide by the precedents of the Court. Even if you agree or disagree with them, you are going to abide by those precedents, and that is all you can do as a lower court judge.

Senator BOB SMITH. Mr. Chairman, I would just make a point on that, and I understand that and I respect that you both have to say that. But precedents on the Supreme Court are set on the basis of people's personal views. Many times, that has happened.

For example, prior to *Roe v. Wade*, if I asked you whether or not there was a constitutional right to abortion, what would you say?

There is no precedent here now, so I am asking was there a constitutional right to abortion prior to 1973 when the precedent was set.

The CHARMAN. As much as I agree with your position on that, that is not a fair question to these two nominees here because regardless of what happened pre-1973, they have to abide by what

has happened post-1973 and the current precedents that the Supreme Court has.

Senator BOB SMITH. Mr. Chairman, I understand that, but my point is that precedent is set because-Senator Sessions just mentioned the case where a justice's personal views on the death penalty impacted his decisions in setting precedent, if his view had prevailed, which it did not. That is all I am getting at.

I am not trying to have you pre-judge a case, and I understand you can't do that, but it is difficult for us in the advise and consent role if we can't get into your minds a little bit. You could very well be a Supreme Court justice in the future, and so I am just trying to understand where the thinking comes here.

Precedent is one thing, but I don't think you can always separate-when you are setting the precedent as a Supreme Court justice, should you be a Supreme Court justice, I don't think you can always separate your personal views from the law because you are establishing the law with that precedent. That is the point that I am making.

Chairman HATCH. If I could just add, I think those are interesting comments. I have to say that judges, if they don't abide by the rule of law, then they shouldn't be on the bench, especially lower court judges, and especially circuit court judges. I mean, this is the closest thing to the Supreme Court, and the circuit courts decide thousands and thousands of very important cases that the Supreme Court is never going-to decide. So I don't know how you could have answered any differently than you did.

Again, I would just caution both of you that I have seen terrific liberal circuit judges and I have seen lousy ones. And I have seen terrific conservative circuit judges and I have seen lousy ones. The

key is do you understand the role of judging and will you apply the most honorable, honest approach that you possibly can to the cases that come before you. I will tell you one thing, I have no doubt that both of you will do that, and so we strongly support you and we will get you out of this committee as soon as we possibly can.

Mr. FISHER. Thank you.

Chairman HATCH. We think both of you have led very distinguished careers and we are honored to have both of you with us today. So with that, we may put you on-in fact, we may put all the judges on today's judiciary markup. And if we can, we will try to get you out and through the floor as quickly as we can because you are excellent people and we are honored to have you here.

Senator SESSIONS. Mr. Chairman, we do have a problem with the Ninth Circuit and there is some real genuine concern about that.

Chairman HATCH. And I think that is right.

Senator SESSIONS. And Mr. Fisher is, I guess, the third in line on that. I am not sure that the President understands the need of moving that circuit into the mainstream, and until we get some sort of accord from that we are going to have controversy over the Ninth Circuit nominees.

Chairman HATCH. And rightly so.

Senator SESSIONS. I have made my position clear on it, and I appreciate your position, but it is an unfortunate circumstance at this point in time.

Chairman HATCH. Well, it is, and some of our people feel very deeply about that and I do, also. I just don't believe that we should hold good nominees or vote against them just because it is the Ninth circuit.

We believe, Mr. Fisher, you are going to add something to that circuit.

Mr. FISHER. I would hope so and I-

Chairman HATCH. You understand the role of judging and you have expressed that very satisfactorily to me, and I hope that you will be a force for good there because that circuit is hurting a lot of liberal nominees because of the judicial activism that goes on there, and I say unjustified judicial activism, not that it is ever justified, but let's just make it even more clear.

Mr. FISHER. I am aware of the Senator's concerns.

Chairman HATCH. Well, we are counting on you helping to restore that court to the dignity that it should have and that it does not have today because of some of these judges who basically ignore the law.

So we thank both of you for being here. We will do the best we can to get you out of the committee as soon as we can.

Mr. FISHER. Thank you. Thank you all.

Chairman HATCH. Thank you.

WILLIAM FLETCHER
WEDNESDAY, APRIL 29, 1998
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:06 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Mike DeWine, presiding.

Also present: Senator Feinstein.

OPENING STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR
FROM THE STATE OF OHIO

Senator DEWINE. Good afternoon. We will begin the hearing with our first panel. This is a Judiciary Committee meeting on judicial nominations. We have four nominations in front of the committee today: William Fletcher, of California, nominated to be U.S. circuit judge for the Ninth Circuit; Chester J. Straub, of New York, to be U.S. circuit judge for the Second Circuit; William P. Dimitrouleas, of Florida, to be U.S. district judge for the Southern District of Florida; and Judge Stephan P. Mickle, of Florida, to be U.S. district judge for the Northern District of Florida.

Senator DEWINE. Let me at this point turn to my colleague, Senator Feinstein, to make some initial opening comments as well as introducing William Fletcher.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR
FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I appreciate serving as ranking member in lieu of Senator Leahy, and

I wish to, with your permission, place in the record his statement.

Senator DEWINE. It will be made a part of the record.

Senator FEINSTEIN. And also a statement of my colleague, Senator Boxer.

Senator DEWINE. It will be made a part of the record as well.

Senator FEINSTEIN. Thank you, Mr. Chairman.

It is my pleasure to introduce Prof. William Alan Fletcher, the President's nominee to serve on the Ninth Circuit Court of Appeals.

Dr. Fletcher's nomination has now languished in this committee for over 3 years, but this is not because of doubts about Professor Fletcher's abilities or his qualifications for this position. In fact, this committee favorably recommended this nominee to the full Senate back in May 1996.

We all know why this nomination has languished. Dr. Fletcher's mother is also a ninth circuit judge. She has pledged to take senior status once her son's nomination is confirmed.

As we all know, this committee and the Senate have previously confirmed blood relatives to the same court of appeals. In 1992, Morris Arnold, brother of sitting judge Richard Arnold, joined his brother on the Eighth Circuit Court of Appeals after nomination by President Bush and confirmation by this committee and the U.S. Senate. At his committee hearing, four Senators noted that Judge Arnold would be joining his brother on the Eighth Circuit Court of Appeals.

But all of this is really beside the point. The point is by training, by scholarship, and by temperament, Willie Fletcher is extremely well qualified to serve on the Ninth Circuit Court of Appeals.

Let me tell you a little bit about him.

His education credentials are top-notch. He earned his undergraduate degree at Harvard where he was graduated

magna cum

laude. He won a Rhodes Scholarship to Oxford. He earned his law degree at Yale. He served in the U.S. Navy, where he worked in Washington, DC, in the Office of Emergency Preparedness.

He served as a law clerk for U.S. Supreme Court Justice William J. Brennan, Jr., from 1976 to 1977. Prior to that, he served a 1-year clerkship for District Judge Stanley Weigel. Since 1977, he has been a professor of constitutional law at Boalt Hall School of Law at the University of California at Berkeley. He won the 1993 Distinguished Teacher Award and came to be regarded as one of the foremost experts on the Federal courts and the

U.S. Constitution. His views have been published extensively in law review articles across the country.

University of Texas Law Professor Charles Alan Wright, one of the Nation's leading conservative constitutional scholars, had this to say about William Fletcher.

“Too many scholars approach a new issue with preconceptions of how it should come out, and they force the data that their research uncovers to support the conclusion they had formed before they do the research. I think that is reprehensible for a scholar, and it is dangerous for a judge.

I am completely confident that when Fletcher finishes his service on the Ninth Circuit, we will say not that he has been a liberal judge or a conservative judge, but that he has been an excellent judge, one who brought a brilliant mind, great powers of analysis, and total objectivity to the cases that come before him.

I believe that the nomination of William Fletcher will much add strength to the Ninth Circuit, and I hope very much that he is confirmed.”

What a wonderful statement. And it goes on.

Professors David Meltzer and David Shapiro of Harvard Law School wrote in a joint letter:

“Mr. Fletcher is a scholar of first rank. His writing in the area of Federal courts displays intellectual rigor, mastery of the subject, and very sound and balanced judgment about complex and controversial legal matters. His voice is an important one that is broadly respected by a wide range of scholars. His work reflects the abilities not only of a creative scholar, but also of a careful and thoughtful lawyer.”

Stephen Burbank of the University of Pennsylvania Law School writes:

“His work is both analytically acute and painstaking in its regard for history. Indeed love of and respect for history shine through all of his work as the history itself illuminates the various corners of the law he enters.”

The New Republic wrote in an editorial on May 22, 1995:

“After 2 years of lamenting President Clinton's failure to appoint scholars to the Federal courts, we're delighted to note that he last week nominated UC-Berkeley's William Fletcher to the United States Court of Appeals for the Ninth Circuit.

He is the most impressive scholar of Federal jurisdiction in the country. His pathbreaking articles on sovereign immunity and Federal common law have transformed

the debates in these fields, and his work is marked by the kind of careful, historical, and textual analysis that should serve as a model for liberals and conservatives alike. If confirmed, Fletcher will join his mother, Betty, on the Ninth Circuit, but his judicial philosophy is more restrained than hers. We hope he is confirmed as swiftly as possible.”

That is the New Republic, Mr. Chairman.

Mr. Chairman, Yogi Berra, not a particularly great legal scholar, told us: "The game isn't over until it's over." I have really come to believe that with respect to confirmation in the U.S. Senate. And I strongly believe that it is high time that we end the games, that

we focus on William Fletcher's qualifications, this man to serve on the ninth circuit. Once we do, I really believe that he will sweep through this committee and sweep through the U.S. Senate.

Thank you, Mr. Chairman.

Senator DEWINE. Senator Feinstein, thank you very much.

I would invite our four nominees to come up at this point and remain standing, and I will swear you all in at the same time.

Please raise your right hand. Do you swear the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. FLETCHER. I do.

Senator DEWINE. I invite you all to be seated.

Mr. Fletcher, we will start with you. I will go through and ask each of you if you would like to make an opening statement. If you would like to introduce any members of your family who have not been introduced you may do so, or if you would like to introduce them again, that would be fine.

Mr. Fletcher, I did notice quite a reaction by, I assume, your mother back there when the comment was made about your mother. I got a reaction from your family. It was quite a reaction. You

can explain that comment to your mother, I guess.

TESTIMONY OF WILLIAM A. FLETCHER, OF CALIFORNIA, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Mr. FLETCHER. Thank you very much, Mr. Chairman, and thank you very much, Senator Feinstein. It is a deep honor both to have received the nomination and to be here today.

If I could begin by introducing family and friends, I would like to do so.

First, my wife, Linda Morris Fletcher, has accompanied me. Two of our daughters are here: Leah Collier Fletcher, who is a sophomore at Harvard.

Senator FEINSTEIN. Could they stand?

Mr. FLETCHER. Oh, yes.

Senator DEWINE. Welcome. We welcome you.

Mr. FLETCHER. Caroline Violet Fletcher, who is a sophomore at Berkeley High School.

Our oldest daughter, Anne Elizabeth Fletcher, who is a senior at Whitman College in Washington State, unfortunately, is in the middle of the last stretch to get her thesis and her finals finished, and her senior year at college, I am afraid, prevented-

Senator DEWINE. We understand.

Mr. FLETCHER. Further, I would also like to introduce a few friends and some students who have come. Several friends: Prof.

Vicky Jackson, Mr. David Rowe, Ms. Jenny McCarthy Taylor. And

there are too many to name, and I am too grateful to express adequately how happy I am they are here, a number of my former students are here, and I am very grateful for their presence.

Senator DEWINE. That is a very nice tribute.

Mr. FLETCHER. Thank you, and I have no formal prepared statement beyond the introduction.

Senator DEWINE. Thank you. Well, we welcome all of you here today.

Mr. Fletcher, the committee, as Senator Feinstein has pointed out, has already held a hearing in the last Congress, and so we have that record available. In addition to the transcript of that hearing, of course, we also have copies of the written questions that were submitted to you at the time and the responses that you

made. So that is available. It is now a different Congress. We feel it is necessary to hold a different hearing. But the transcript from the first hearing is, of course, available to any member of the Judiciary Committee or any member of the Senate who wishes to examine it.

Mr. Fletcher, let me start, if I could, with you. In an October 1987 California Law Review article, you reviewed a book and you stated your concern that, "The current Supreme Court is composed of former judges, practitioners, Supreme Court law clerks, and academics. This lack of practical and governmental experience is the greatest weakness of the present Court."

I wonder if you could comment on that, and I hope I have not taken it out of context. I don't think I have. But this is an age-old argument, I guess, about who should go on the Court. And I assume that you could have the same discussion in regard to the appellate court as well. I just wonder if you could comment. Is that a good reflection of your point of view today? Do you have similar concerns with the appellate court? And I wonder if you could tell us how your background and experience meets the concerns you expressed.

Mr. FLETCHER. Thank you, Mr. Chairman. What triggered that remark was Chief Justice Rehnquist's book on the U.S. Supreme Court and, in particular, his recounting of the steel seizure case, which was tried or argued before the U.S. Supreme Court while he was a clerk to Justice Jackson. And I contrasted the Justices on that Court to the Justices on the present Court, the then-present Court a few years ago.

The striking-contrast was striking. The degree of political and practical experience in Government on that Court was much greater than on the present Court, and I believe it assisted the Court in the steel seizure case in understanding the serious issues of constitutional structure and even of statesmanship at issue there.

I contrasted that Court to the present Court and its response to certain structural cases that had come before it. I wish to emphasize that my comment was in no way a reflection on the individual

Justices. Every one of the Justices on that Court and the slight changes since then on the present Court are eminently well qualified to sit on that Court. My point went, rather, to the overall composition, the diversity of viewpoint, if you like, on the Court. And it has been true now for at least a generation that the U.S. Supreme Court has not had the practical political experience among its members that it used to.

In most cases, I do not think it makes a great deal of difference.

In the cases where we have questions between the separation of powers, particularly of separation of powers, questions of the relationships between the two political branches of the national Government, I believe political experience is useful. Certainly, I do not think that all justices should have it, but I do think it would be useful to have one or two on the court who do have such experience.

Senator DEWINE. Mr. Fletcher, let me follow up with that, if I could, and I appreciate your answer. A quick review of your biography would indicate that you have spent a good part of your career in the academic environment. How do you think that prepares you in regard to your nomination?

Mr. FLETCHER. Mr. Chairman, it prepares me in some respects, and it leaves me in need of further preparation in others.

What I do and what I know well is the study of the Federal court system, and on issues of jurisdiction, on issues of procedure, on issues of the relationships between the Federal courts and the

State courts, I think I need no further preparation at this point. What I will need a great deal of further work on is, for example, criminal law. I know civil law, not criminal law, and there will be certain things, I am sure, that will come as total surprises to me that I need work on that I did not even understand I needed work on.

As to the overall composition of the court of appeals, which was in your earlier question I neglected full to answer, I think the same point may be made for the Court of Appeals that you need a diversity of viewpoint and experience on the overall court, and academics have, of course, served with distinction on our courts of appeals and, indeed, our U.S. Supreme Court. I hope to follow in the footsteps of some of the academics who have served with distinction on our courts of appeals.

Senator DEWINE. Your quote about the Supreme Court-I interpret it to reference what I would call life experience. I do not know

if you use that term or not, but that is the gist of what I understood from that quote. How would you say your life experiences

have prepared you? You have obviously done things before you were in the academic world. I wonder if you could just run through that for us a little bit. Tell us how that has prepared you.

Mr. FLETCHER. OK. Thank you for that question, Mr. Chairman. One's life does prepare one for what comes next, including, I think, for the possibility of becoming a judge. Much of what I would say in my life experience that might have prepared me is not so much my formal training, although I will get to that in a moment, but it has been my experience in my community, my experience with my family, my experience with various aspects of what one might call ordinary life.

My wife and I together have raised three girls. I listened with interest to Senator Mack's comment about coaching. I have coached my daughter's softball team, and there are occasionally challenges that come up in coaching softball teams.

Senator DEWINE. Not from the kids, but from the parents, I think, would be my experience.

Mr. FLETCHER. Mr. Chairman-

Senator DEWINE. I have not coached, but I have observed.

Mr. FLETCHER. Mr. Chairman, you have that right.

Further, we have been deeply involved, my wife more than I, in the public schools in Berkeley, and that is a combination of practical experience and political experience. I wish it were not political, but it can occasionally be.

I find also that the experience of being an educator, not now a scholar, but being an educator, dealing with my students, dealing with the practicalities of education has been useful.

As to professional training, much of what I have done has been historical, and I must say the historical research, for example, on marine insurance in the early 1800's, will have little relevance to what I am hoping now to do if I am so lucky as to be confirmed.

Other parts, I think will be useful. For example, I am the coauthor of a book, "The Civil Procedure," and that is a highly practical business. I cannot claim to be fully experienced across the broad range of things that will be expected of a circuit judge, but I hope at least I can bring enough that it would be a good beginning.

Senator DEWINE. Thank you.

I want to ask a series of questions that I would like each one of you to address. I will start with Mr. Fletcher. These are fairly routine questions, and sometimes people may wonder

why these questions are asked. I think that it is necessary to ask them, even if we can pretty much figure out what your answers are going to be. I think it is important to have it on the record, and I think it is important in a public hearing to have these questions asked and answered.

The first question, again, I would start with Mr. Fletcher, and we will just go right down the line. Are you committed to following Supreme Court precedent and the rulings of the Federal Circuit Court of Appeals for your district faithfully in giving them full force and effect even if you personally disagree with such precedent or rulings?

Of course, for you, Mr. Fletcher, that question has to be altered a little bit, just to include the Supreme Court as well as previous precedents of the court of appeals.

Mr. FLETCHER. Yes. I am so committed.

Senator DEWINE. Again, starting with Mr. Fletcher, what would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you, nevertheless, apply that decision or your own best judgment of the merits?

Mr. FLETCHER. Mr. Chairman, I would, of course, follow the precedent of the U.S. Supreme Court.

Senator DEWINE. Let me ask one more question, and then I will turn to Senator Feinstein. As a judge, would you be bound by the Supreme Court precedent and the rulings of the Federal Circuit Court of Appeals for your district? There may be times, however, when you will be faced with cases of first impression. What principles will guide you, or what methods will you employ in deciding

cases of first impression? Mr. Fletcher, we will start with you.

Mr. FLETCHER. Mr. Chairman, I would say, first, that a case of truly first impression is quite rare, and I would do my best to find governing law so that this is not a case of first impression. It is a matter of degree, and there will be sometimes questions that are either new or sufficiently new. They may fairly be so characterized. In that event, one begins with whatever are the relevant texts. It may be a constitutional text or a statutory text, occasionally even a text of a treaty.

Then one must move to the governing case law, governing law of other sort. It may be regulations or whatever.

Eventually, one must move, if all those things are somewhat indeterminate, to principles that one may derive from those texts and from that case law, and one must try earnestly to harmonize whatever the decision is of the particular case with the preexisting law.

Senator DEWINE. Thank you very much.

Senator Feinstein.

QUESTIONING BY SENATOR FEINSTEIN

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Mr. Chairman, I am going to confine my questioning, if I might, to Professor Fletcher. He has been through this before, and in the 5 1/2 years I have been on this body, I think Professor Fletcher's questioning in the prior hearings has been the most comprehensive of virtually any nominee--and probably a combination of a third of the nominees that I have listened to. I have come to believe that maybe that is a test: That if you survive the test, it is, indeed, a very good thing.

I want to ask this question about precedent and standing as an update of the record, which is becoming quite voluminous in your case, Professor Fletcher.

In your last nomination hearing in December 1995, I asked you a question about precedent, and you responded, and I quote, "As an academic, my job has been to understand the current doctrine, to suggest ways in which the current doctrine is good, in which it is unsatisfactory, and to suggest ways which it might be improved."

You also noted that if you were confirmed, "My role would be, of course, changed, and a judge's job on the court of appeals is to follow carefully the law already laid down by the U.S. Supreme Court

and laid down by the circuit in cases decided previously. I would be scrupulous in my attention to statutory texts, constitutional text, and judicial precedent."

At the previous hearing and again today, you have been questioned closely on your writings on relative subjects. How would

your new role as a court of appeals judge change the way in which you approach the law, particularly regarding precedent?

Mr. FLETCHER. Thank you, Senator Feinstein.

I would like to say, again, but in reformulated words perhaps, but essentially what I said before. The job of an academic is not the same as the job of a judge, and my job now as an academic is to investigate the law, to suggest ways of changing the law if and when I think those are appropriate, to think of different rationales to support results already reached in the law, and to educate students as to the structure of the law.

As a judge, the function will be changed, and I will do my utmost to follow carefully the existing law as a judge and to leave behind my previous job as an academic.

Senator FEINSTEIN. I thank you.

Professor Fletcher, at your previous hearing, Senator Thompson quoted from your 1988 Yale Law Journal article on standing, and let me quote. "I propose that we abandon the attempt to capture the question of who should be able to enforce legal rights in a single formula, abandon the idea that standing is a preliminary jurisdictional issue, and abandon the idea that Article III requires a showing of injury and fact. Instead, standing should simply be a question on the merits of plaintiffs claim." Would you like to add anything to that?

Mr. FLETCHER. I would not like to add anything in the sense of changing, but I might like to add something in the sense of explaining.

It has often been difficult for my students, as well, I think, occasionally for members of this committee to understand what I mean

when I say I would like to abandon the requirement of injury and fact. Injury and fact was imported into the law of standing in 1970 in an opinion written by Justice Douglas, the data processing case. It had come out of-and I think Justice Scalia might like what I am about to say-it had come out of the legislative history of the Administrative Procedure Act, and it has had the fate of many things that have come out of legislative history. It has not worked very well.

Injury and fact is a straightforward factual proposition. People are often tempted to treat it as a normative proposition. I would argue that while we suffer injury and fact in many aspects of our lives, we know that for most of those things, we do not have legal redress.

The question is whether we should have legal redress. To have legal redress, one must have a statutory right, a constitutional right, occasionally judge-made law, but injury and fact has proven to be an analytic difficult for the court rather than an analytic tool of some utility.

For those who might be worried that my abandonment or proposed abandonment of injury and fact would open wide the flood

gates so that the Federal courts would be filled with suits, let me

say two things. First, injury and fact was not an articulated requirement of article III before Justice Douglas' opinion in 1970.

Second, as my article explains, I do not propose that my analysis would change in any significant respect, the results already achieved. Indeed, what I openly sought to do was to provide a more coherent analytic basis for the case law that we already had.

Senator FEINSTEIN. Thank you.

One final question, and Senator DeWine alluded to this somewhat, on separation of powers, and this is, again, in response to

Chairman Hatch's earlier questioning. You explained that in deciding a separation-of-powers case, the court should, and I quote, "first

and foremost seek guidance of the text of the Constitution." You noted, however, and I quote, "There are certain questions to which the Constitution does not provide clear textural guidance." What should the court rely on in those cases?

Mr. FLETCHER. Assuming that the textural guidance is not clear, it can sometimes, nonetheless, be of some assistance. That is to say, the text should be the first resort, and even if it is not conclusive, it may well rule out certain answers.

After that, I would consult-and I am not sure which of the two would come first-it may depend on the case-the existing case law of the U.S. Supreme Court and the structure of the Constitution from which one may infer certain relationships.

It will be, and I think cannot be anything but, a slightly indeterminate exercise calling on, in the Supreme Court Justices, the

highest of, I will call it, political and legal judgment combined, but

I cannot pretend that the text will clearly answer all separation-of-powers questions. It simply cannot.

Senator FEINSTEIN. Mr. Chairman, I just want you to know and the record to indicate, in the 3 1/2 years that this nominee has been pending, I have had occasion and made the effort, particularly in California, to ask many questions of many people about him, most of them are people in the legal profession for whom I have deep regard. I have found that, absolutely, universally across the board,

this is a uniquely respected scholar for his mind and for his judgment. I might say, I have not yet encountered anyone else who is

held in such high regard in my State.

I do not know if that is any consolation for these long 3 1/2 years, but I would like the record to reflect that.

Mr. FLETCHER. Senator Feinstein, thank you both for those kind of remarks and your kind introduction. It was worth waiting for.

Senator FEINSTEIN. Thanks, Mr. Chairman.

Senator DEWINE. Professor Fletcher, Senator Thurmond could not be here. He is at another hearing at this time, but he asked me to ask you the following question, which I am going to read to you.

Professor Fletcher, in a 1991 article entitled "An Appreciation of Justice William Brennan," you cite Justice Brennan as saying, and

I quote, "We current Justices read the Constitution in the only way that we can, as 20th-century Americans. We look to the history of the time, the framing of the Constitution, and to intervening history of interpretation, but the ultimate question must be what do

the words of the text mean, 'in our time.'"

Senator Thurmond's question is: Do you agree that this is the proper approach to constitutional interpretation? And if you could, explain, please.

Mr. FLETCHER. Thank you, Mr. Chairman.

In one sense, in a logical sense, Justice Brennan is right, we have no choice but to interpret the words "in our time" because we live in our time. Yet, if those words are intended to go further, as, indeed, I think Justice Brennan often intended them to go further, to authorize the Supreme Court to treat the Constitution as a living document that could grow independent of the text, I think that

a difficult proposition. I believe that the text of the Constitution should control, and there may be desirable results that the text simply will not support. And if that is so, our solution, I am afraid, would be to amend the document.

Senator DEWINE. Thank you very much.

Professor Fletcher, the following question, I am going to direct to you, but I am going to have a follow-up question which I would invite the other three panelists to respond to.

In a 1982 Yale Law Journal article, you discuss the Supreme Court's actions in school busing cases. You state on page 683 that,

"A traditional judicial role would require that courts in school cases define precise constitutional violations, prescribe remedies narrowly tailored to those violations, and cease judicial involvement at

the earliest opportunity. This greatly lessens the chance of recurring or continuing involvement in a particular case. On the other

hand, the goal of achieving significant and enduring racial integration in the public schools has pushed in the opposite direction."

Then, on page 696 of the same article, you further state, "The only legitimate basis for a Federal judge to take over the political function in devising or choosing a remedy in an institutional suit is the demonstrated unwillingness or incapacity of the political body, but, even then, a Federal district court is not and should not permit itself the illusion that it can be anything more than a temporarily legitimate substitute for a political body that has failed to serve its function."

Do you believe that the court should establish a finish line, so to speak, in ending school busing decrees; for example, at the outset of a case? The practical matter you have alluded to in the first

quote I read is that these cases have gone on for a long, long, long time. How do you balance all that? Just talk to us a little bit about your philosophy.

Mr. FLETCHER. Thank you, Mr. Chairman.

Let me begin with the premise of the article that I wrote. The article assumed that a constitutional violation by the school district or a constitutional violation by the authorities running a prison had already been found, and the question then was not the prior constitutionality of the action, but, rather, the remedy that should be supplied.

In that article, I argued that the exercise of discretion necessarily involved in the formulation of a remedial judicial decree

should be presumptively illegitimate. That is to say, it is not an appropriate task for a judge to perform unless there is realistically

no other choice. And I argued strongly that the political body should draft the remedy, that is to say, should propose what should be done, and that the judge should only say yes or no because the discretionary judgment as to what the remedy should say precisely should not be the judge's. And I argued that the judge should be involved only in case, and I quote, "serious and chronic default by the political branch." That was a more conservative position on that issue than the Supreme Court was then taking.

The Supreme Court in the Charlotte-Mecklenburg case had only insisted upon default, and I raised the bar or proposed raising the bar to serious and chronic default.

As to whether there should be a set termination period, I have to say that is a difficult question because, if you know going in as a reluctant defendant that the school board's involvement will cease within a year, it may alter your behavior. The judge can keep a goal of early withdrawal, and I believe achieve that goal of early withdrawal, without necessarily setting a date certain at the outset. It may in some circumstances be perfectly appropriate, but that would be my one hesitation.

Senator DEWINE. What is the appellate court role in this? I assume most of what you were talking about is at the district court

level because that is how these cases are initially dealt with and that is who has the jurisdiction, unless it goes up on appeal, but give me a little philosophy about the appellate court, and then I am going to turn to Mr. Straub to comment on that as well.

Mr. FLETCHER. Mr. Chairman, the role of the appellate courts in the structural injunction cases, school cases, prison cases and so on, has been relatively limited. The reason it has been relatively limited is that these are, in substantial part, discretionary judgments as to what the decree should be, how long the decree should

last, and it is built into the law that the equity judge has a fair amount of discretion.

In fact, it was part of my argument against the judicial drafting of these decrees that appellate supervision was very difficult. Appellate judges do have a role when the district judge has abused

his or her discretion, and courts of appeal and occasionally the U.S. Supreme Court have reversed what the district judge has done, in my view, entirely appropriately, but those are cases in which there has been a fairly clear abuse of discretion. And I have to say that the courts of appeals are somewhat limited in what they may accomplish.

Senator DEWINE. One final question, Professor Fletcher. In an October 21, 1991

San Francisco Chronicle article, you argued that the Senate should assert its authority to ensure that its advice and consent role becomes a working reality. You also alluded to the fact that the Senate should insist that nominees have relatively centrist views of the Constitution. Is this an accurate summation of your beliefs today, and if so, would you consider yourself to have relatively centrist views of the Constitution?

Mr. FLETCHER. Mr. Chairman, the short answer to that is yes, but, if I may, I would like to give a slightly longer answer.

Senator DEWINE. Sure.

Mr. FLETCHER. That op-ed piece in the San Francisco Chronicle was written after Presidents Reagan and Bush had nominated five

justices to the Supreme Court, and I tried to place that into historical context by indicating that there had been two great waves of ideological appointments to the Supreme Court in this century. The first was under Franklin Roosevelt, and the second under President Reagan and President Bush.

Those two episodes, however, were radically different in that President Roosevelt had a Democratic legislature, and there was little controversy in the country about those nominees and their ideological viewpoints.

That was not the case for the nominees of President Reagan and President Bush because President Reagan and President Bush chose not only Republican nominees, but, for the most part, nominees from the right end of the Republican spectrum. During most

of that period, there was a Democratic Senate, and it was quite predictable that there would be fights, of which we, of course, had two very bitter fights.

I wrote to suggest that--well, to point out the obvious fact--first, that the response to those fights had been actions on behalf of the nominees to withdraw, to pretend that they were blank slates, either to be or to pretend to be blank slates. I thought that that was

an unfortunate development because I do believe that the Senate has an appropriate role in evaluating nominees to the U.S. Supreme Court, and that the Senate has a right to insist that nominees ask questions and get answers within the grounds of propriety in cases that might directly come before the court, on answers that would illuminate the judicial philosophy of those nominees. And I further said--and I particularly meant it in the context of divided government--that the Senate had a right to insist in some genuine say. As to my own position, I do view myself as fairly close to, if I can use the word, the mainstream or the center.

Senator DEWINE. Thank you very much.

Senator Feinstein.

Senator FEINSTEIN. Talking about philosophy, let me ask each of you this question. How do you look at the law and the death penalty?

Mr. FLETCHER. Senator Feinstein, the Supreme Court has been very clear on the point. The death penalty is constitutional, and I would enforce the death penalty, as the Supreme Court has indicated that it is constitutional.

Senator FEINSTEIN. Thank you very much.

Thank you, Mr. Chairman.

Senator DEWINE. Thank you.

I appreciate all of your patience. I appreciate your families' patience as well.

As you know, the record will remain open until the end of the week, which means that members of the committee may submit written questions to you. So, with that as a possibility, we would, of course, ask you to respond to those in a timely fashion.

Senator DEWINE. We thank you very much for your testimony, and this will conclude today's hearing.

JULIO FUENTES
TUESDAY, FEBRUARY 22, 2000
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 3:24 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Specter, Leahy, and Torricelli.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. I apologize for being late here, but I was in a very important top-secret intelligence meeting, and I just couldn't finish up on time. But it was very important that I did what I was supposed to do there.

Today the committee is holding its first nominations hearing of the second session of the 106th Congress. We will hear from two judicial nominees--one circuit court nominee and one district court nominee--and one Justice Department nominee. We will have three panels. The first panel will consist of the sponsors of the nominees who will give brief statements on behalf of their nominees. The second panel will consist of Justice Department nominee Mr. Randolph Moss, and the third panel will consist of the two judicial nominees, Judge Julio Fuentes and Judge James Whittemore.

Now, before we turn to the panels, if the ranking member--well, excuse me. When the ranking member comes in, I will be happy to have him make any comments he cares to make.

Now, if the sponsors of the nominees will take their seats at the witness table, we will begin, and I apologize to you.

Senator Torricelli.

STATEMENT OF HON. ROBERT G. TORRICELLI, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator TORRICELLI, Mr. Chairman, I was going to make remarks with regard to both Mr. Moss and Judge Fuentes, if that was appropriate.

Chairman HATCH. Thank you, Senator Torricelli.

We will turn to the ranking member now.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Mr. Chairman, I am delighted we are having this hearing. It is historic, the first one of this century--unless you count the century as next year. But for those who are counting it for this year, it is the first one. I have looked forward to this hearing. I am very grateful, Mr. Chairman, you announced it back on

February 10 at our first committee business meeting of the year.

We have an outstanding group of nominees before us, including the Federal judicial nominees and the nominee to head the Office of Legal Counsel at the Department of Justice.

What Senator Torricelli said was absolutely right. I have a long statement, but I know you want to get to the people here, and I will put my statement in the record.

I would hope, even though it is an election year, that we could move forward on some of these nominations. There are too many

still pending. We do have a lot of areas where we need to have judicial vacancies filled. There are some places where judicial crises have been declared. And once these people have been nominated, they ought to know whether they are going to go forward or whether they are going to be held in limbo. So I would hope that the nominees before us today will go forward. I hope that they will be confirmed by this committee and by the Senate.

In any event, Mr. Chairman, I thank you for holding the hearing, and I will put my whole statement in the record.

Chairman HATCH. Well, thank you, Senator.

STATEMENT OF RON. FRANK R. LAUTENBERG, A U.S. SENATOR
FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thank you very much, Mr. Chairman. I am grateful to you for giving us the opportunity to speak in support of an outstanding judicial nominee, Judge Julio Fuentes. He

is here with his family, and it is a privilege to be able to present someone to the committee who has such outstanding credentials.

Because not only does Judge Fuentes have the professional capacity, Mr. Chairman, the experience that he brings to this job, but

he also has a personal story of what America is all about. He sets a wonderful, wonderful example for those who look at our society and see that you can make progress if you have the ability and are willing to expend the effort.

But, Mr. Chairman, I want to take a moment to thank you personally. We have had many private discussions. I consider us good

friends, and I commend you for your hard work in moving nominees to New Jersey's Federal courts through this committee and for

supporting our nominees on the Senate floor.

Chairman HATCH. Thank you.

Senator LAUTENBERG. You were instrumental in helping in so many ways, Mr. Chairman, for instance, the confirmation of Mary Ann Trump Barry to the third circuit and Faith Hochberg and Joel Pisano to the district court for New Jersey.

When Judge Fuentes is confirmed-and I am hopeful and confident that he will be-all of New Jersey's seats in the Federal judiciary will have been filled. That is a wonderful thing for us because

of the enormous backlog. And it is extremely important that our judiciary be at full strength, and I am sure all members of the committee are aware of this, Mr. Chairman.

Chairman HATCH. That is a tribute to you and Senator Torricelli, it seems to me.

Senator LAUTENBERG. Well, I thank you, Mr. Chairman. We have worked hard and have presented, I think, excellent candidates for the court.

Our courts can't fulfill their constitutional responsibility to dispense justice fairly and efficiently if there aren't enough judges to

hear the cases. So, again, I thank you for your help and for your support of our nominees to the Federal bench. And today the committee has before it an exceptional nominee from New Jersey,

Judge Fuentes.

In many ways, as I noted earlier, his life demonstrates the promise of America, the idea that anyone committed to getting an education and working hard can build a distinguished career. Judge

Fuentes was not born to wealth or privilege. He was raised by a single parent. His mother worked hard as a nurse. But he pursued his education diligently, earning a college degree while serving his country in the Army's special forces.

Eventually, he earned not only a law degree, but also two master's degrees. And after completing law school, Judge Fuentes began building a successful legal practice, honing his skills as an associate with a New Jersey law firm in Jersey City. He later established his own firm, and he handled a wide range of criminal and civil matters.

In 1978, he was appointed to a judgeship on the Newark Municipal Court, where he served until his appointment to the New Jersey Superior Court in 1987. And as a superior court judge, he presided over criminal cases and a wide range of civil disputes, including product liability, environmental suits, and property claims. He has ruled on a number of Federal and State constitutional issues.

In addition to his courtroom duties, Judge Fuentes has helped address important issues facing the New Jersey courts. He served on two New Jersey Supreme Court task forces, one on drugs in the courts and the other on minorities in the legal system. And he has also volunteered his time to help members of the community. He has mentored many Latino youths, and he has received several awards for his public service.

Because of his dedication and commitment to others, Judge Fuentes is held in exceptionally high esteem by his judicial colleagues, the lawyers who appear before him, as well as the people

in New Jersey. And those who know him well describe him as bright and dedicated and even-tempered, but he is also a man with humility. And I hope I have not embarrassed him with these remarks.

In short, I am confident that Judge Fuentes' depth of experience, legal knowledge, compassion, and temperament will make him an exceptional Federal judge. And I thank you, Mr. Chairman, once again for your fairness in dealing with us and giving Judge Fuentes this hearing. And I hope that you and all the members of the committee will support his nomination.

Chairman HATCH. Well, thank you so much, Senator Lautenberg. It is high praise for both you and Senator Torricelli to be strongly behind Judge Fuentes, and we will look forward to his hearing in just

a few minutes. Thank you for being here. We appreciate it.

Well, we will now ask Judge Julio Fuentes of New Jersey, who has been nominated to be circuit judge in the U.S. Court of Appeals for the Third Circuit, and Judge James D. Whittemore of Florida, who has been nominated to be a district judge in the U.S District Court for the Middle District of Florida, to please come forward and take your seats. You are over here, Judge Fuentes; Judge Whittemore, right there.

If you would, raise your right hands. Do you swear that the testimony you shall give in this hearing shall be the truth, the whole

truth, and nothing but the truth, so help you God?

Judge FUENTES. I do.

Senator TORRICELLI. Mr. Chairman, could I use this occasion to address a question of Judge Fuentes' nomination and perhaps introduce him to the committee?

Chairman HATCH. Sure.

STATEMENT OF HON. ROBERT G. TORRICELLI, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator TORRICELLI. Mr. Chairman, I want to welcome Judge Whittemore and Judge Fuentes to the committee today, and particularly note with great pride the nomination of Judge Fuentes for the Third Circuit Court of Appeals.

Mr. Chairman, there are many things about Judge Fuentes' nomination that should be noted today: first, I note with

considerable

pride that he would be the first person of Hispanic descent to serve on the Third Circuit Court of Appeals, which is a source of great pride to the growing population in New Jersey of people of Puerto Rican, Colombian, Dominican, and Cuban descent. The entire community feels an enormous pride at this great personal achievement, and also the achievement of an entire community.

I should also note, Mr. Chairman, that the other thing historic about Judge Fuentes' nomination is he also served the briefest tenure in history on the District Court of New Jersey. Originally,

Judge Fuentes was my nomination for the district court, and upon his interview by White House officials, they were so impressed with him that they told me that, indeed, they could not nominate him for the district court, but they were very pleased to nominate him for the court of appeals. He had less than a day on the district court as the President's nominee. And that is a considerable testament to his abilities and his career.

I should note, Mr. Chairman, too, that he is joined by his family: his wife, Olma; his daughters, Karina and Olma, who are here with him today; and a third daughter, Lilly, who I understand, Judge Fuentes, is not able to be with you today. I know what this must mean to his family as well.

Mr. Chairman, let me note simply about Judge Fuentes' career, if I could. From his days in law school to his current tenure on the Superior Court of New Jersey, Judge Fuentes has developed a reputation as a very accomplished member of the bar. He began his

career at the State University of New York in Buffalo. He should have gone to Rutgers in New Jersey, but this single lapse of judgment has not precluded his nomination today. He was in legal

practice, in private practice, for 7 years where he practiced both civil and criminal law, while also serving as a part-time judge in Newark's Municipal Court.

In 1981, he assumed the bench as a full-time municipal judge where he remained until 1987 when he was promoted to the New Jersey Superior Court. He has now served 13 years on the State Superior Court where he has genuinely received a tremendous reputation among members of the bar. I would like, Mr. Chairman, to add in the record, with your permission, letters from Governor Whitman in support of Judge Fuentes' nomination, letters by Carlos Ortiz and Dewar Bradshaw from the Hispanic National Bar Association in support of his nomination, and from the New Jersey State Bar as well. With your permission, I would enter these in the record.

Chairman HATCH. Without objection, we will put them in the record.

[The letters were not available at presstime.]

Senator TORRICELLI. Mr. Chairman, then let me simply say that you have been very helpful to me in moving forward nominees for the district and appellate court, but in none of those instances have I felt any more pride than I do today with Judge Fuentes. I am very grateful for you moving this nomination. Indeed, with Judge Fuentes' nomination, each of the nominations in New Jersey that we have brought forward, you will have now moved toward confirmation, and for that I am very personally grateful. Judge Fuentes, I am very proud to have been part of this achievement in your life and very grateful for your willingness to serve the people of our country.

Judge FUENTES. Thank you, Senator Torricelli.

Chairman HATCH. Well, thank you, Senator Torricelli. That is great

praise, and I have a lot of respect for Senator Torricelli.

Would either of you care to make a short statement to the committee? We will start with you first, Judge Fuentes, if you care to,

and then to you, Judge Whittemore.

TESTIMONY OF JULIO M. FUENTES, OF NEW JERSEY, TO BE
U.S. CIRCUIT JUDGE FOR THE THIRD CIRCUIT

Judge FUENTES. Mr. Chairman, first I would like to thank you for giving me the opportunity to appear before this committee. It certainly is an honor and a pleasure for me and my family.

I would like to thank-

Chairman HATCH. It is an honor for us to have you here, your family as well.

Judge FUENTES. Thank you, sir. I would like to thank Senator Torricelli and Senator Lautenberg for their gracious introductory remarks. I am particularly grateful to Senator Torricelli for presenting my nomination to the President.

The Senator has introduced my family. I would like to mention them again. I am very proud of my family and very grateful that they are here. I want to thank my wife, Olma, who has given me tremendous support throughout our marriage. She is present. And my two daughters, Olma and Karina, who are here from college, and I greatly appreciate their support.

Chairman HATCH. Glad to have all of you here.

Judge FUENTES. Lilly is unfortunately not able to come. She is married to a serviceman and is residing in North Carolina and could not be present today, but I have her support and I want to thank her as well.

I would like to also mention that there are members of the National and the New Jersey Hispanic Bar Association who are

present. I want to recognize Carlos Ortiz, who is present here today. I would like to also recognize Ramon De la Cruz and Maritza Berdote Byrne, who is here as well.

Finally, Mr. Chairman, I would like to thank your staff and I would like to thank the staffs of Senator Leahy and Senator Torricelli for all the courtesies that they have shown throughout this process.

Thank you, Senator.

Chairman HATCH. Thank you so much, Judge.

That is great. Glad to have you and your family here.

Let me start with you, Judge Fuentes. You have worked as a judge for the last 22 years, serving first as a municipal judge for 9 years and then for the last 13 years as a superior court judge.

For a portion of that time, you served in your court's Criminal Division, and I am sure you noticed the expansion of Federal crimes

that has occurred during your 22 years as a judge.

Now, the Supreme Court has noticed and has issued several federalism decisions in the past few years that have recognized that

Congress has overreached in some instances and emphasized that State institutions have the power to govern State transactions and activities.

In your view, how will the recent federalism decisions of the U.S. Supreme Court impact the work of the Federal courts, including the Third Circuit Court of Appeals? And do you believe or view this as a positive development or a negative one?

Judge FUENTES. I would have to say it is a positive development

in this sense, Mr. Chairman: The concept of federalism is a recognition that States and their institutions ought to be permitted to make their decisions, that is, to function separately in separate ways. This recognition I believe is what makes our Nation strong. I think that the National Government fares better when States are indeed allowed to perform their functions separately.

Chairman HATCH. Thank you. Let me turn to Senator Specter at this point.

QUESTIONING BY SENATOR SPECTER

Senator SPECTER. Thank you, Mr. Chairman.

Judge Fuentes, I have attended the hearing especially because you are up for nomination for the Court of Appeals for the Third Circuit, and so far Senator Torricelli and I have been able to maintain that long, unguarded border, western New Jersey and eastern

Pennsylvania. But I wanted to hear your testimony.

And on a serious vein, do you think that your experience in the State courts will be a significant plus for service on the Court of Appeals for the Third Circuit?

Judge FUENTES. Thank you, Senator Specter. I, as you know, have been in the State court system for over 20 years. I have handled every kind of case, from the simplest traffic offense to the

most complex criminal and civil matter. I have that breadth of experience in addition to which I work very hard and I am very dedicated, and if privileged to serve on the third circuit, I would bring that same hard work and dedication.

I have no illusions about how difficult this job is. I think it is going to be very, very difficult. But it is a challenge that I am prepared, I believe, to meet and, of course, again, a privilege to serve

on the court. I will take advantage of every course that is offered through the Federal Judicial Center to aid me in doing this job better.

Senator SPECTER. In the Federal Court of Appeals, you are going to be facing very, very different issues. You are going to be facing Securities Act cases. You are going to be facing antitrust cases. You are going to be facing very complex litigation. But I do believe if you approach it with diligence and hard work, your background will stand you in good stead. You are going to be up with the tough taskmaster in Chief Judge Becker. He has an undermanned court-underpersonned court. He has some women on the court as well. And it is a very prestigious court, and it has got a tremendous volume of very high-powered litigation. But Senator Torricelli speaks of you very highly, and I know of your record. But I just wanted to come down and participate briefly in the hearing.

Chairman HATCH. Thank you, Senator Specter. I appreciate that.

Let me just ask a few other questions before we finish today. The Founding Fathers-and I will just ask both of you to answer this question. The Founding Fathers believed that the separation of powers in a government was critical to protecting the liberty of the people. Thus, they separated the legislative, executive, and judicial branches and the powers into three different branches of government, the legislative power being the power to balance moral, economic, and political considerations and make law, the judicial power being the power only to interpret laws made by Congress and by the people.

In your view, is it the proper role of a Federal judge when interpreting a statute or the Constitution to accept the balance struck

by Congress or to rebalance the competing moral, economic, and

political considerations?

Judge FUENTES. I believe, Mr. Chairman, that a judge is required to accept the balance that is struck by the U.S. Constitution

and Congress. A judge's responsibility is to interpret the laws, not to legislate from the bench.

Chairman HATCH. All right. Under what circumstances do you believe it appropriate for the Federal court to declare a statute enacted by Congress unconstitutional?

Judge FUENTES. It is a very rare occasion, Mr. Chairman. Rarely will a Federal court declare a statute unconstitutional. A judge is required to apply all existing precedent to the issue that is presented. Only in the clearest and most compelling circumstance

would a judge declare a statute of the Congress unconstitutional because we have to be mindful that the Congress represents the will of the people. That is entitled to great respect and deference.

Chairman HATCH. OK, now, the Supreme Court precedents are binding on all lower courts, and the circuit courts of appeals precedents are binding on the district courts within that particular circuit.

Now, are both of you committed to following the precedents of the higher courts and following them faithfully and giving them the full force and effect, even if you personally disagree with those precedents? Judge Fuentes?

Judge FUENTES. I am committed and bound to following the precedent of the U.S. Supreme Court and the precedents of my circuit, yes.

Chairman HATCH. All right. Now, please state in detail your best independent legal judgment on the lawfulness under the Equal Protection Clause of the 14th amendment and Federal civil rights laws of the use of race-, gender-, or national origin-based preferences in such areas as employment decisions-that is, hiring, promotions, layoffs--college admissions and scholarships awards, and the awarding of Government contracts.

Judge FUENTES. Mr. Chairman, according to the U.S. Supreme Court in the case of Adarand v. Peña, race-based and gender-based classifications must be subjected to the strict scrutiny standard of review. Classifications involving race and gender can only be sustained if they are narrowly tailored to respond to a compelling

State interest. And if I am privileged to serve on the Court of Appeals, that is the ruling that I will uphold.

Chairman HATCH. Do either of you have any legal or moral beliefs which would inhibit you or prevent you from carrying out--from imposing or upholding a death sentence in any criminal case that might come before you as a Federal judge?

Judge FUENTES. Mr. Chairman, the U.S. Supreme Court has spoken clearly on the subject. There is no constitutional bar to the imposition of the death penalty, and if I am privileged to serve, I will uphold that law.

Chairman HATCH. Thank you.

Senator Torricelli, do you have any other questions.

Senator TORRICELLI. Mr. Chairman, I don't have any questions, but maybe just a comment in wishing both Judge Whittemore and Judge Fuentes well and a successful career on the bench.

Mr. Chairman, I have noted recently that the architect of American independence and our Nation's Constitution, Thomas Jefferson, upon becoming President attempted to eliminate the court of appeals as being superfluous. We no longer recognize it as such. It is a very important part of our system of justice.

And I leave you with this simple observation: We count on you to be part of the system of justice to defend the American people

from those who would victimize them, those on the streets, those who would steal or rob or hurt them, but also to protect them sometimes from the excesses of their own Government. As a Democrat, I sometimes have a different philosophy on this issue. But I believe that, like many of my Republican colleagues, the judiciary is an important bulwark against the excesses of Government. You are in the Government, but you are not of the Government. Your independence is the most critical aspect of your service in the judiciary. I trust the smallest, poorest, and most powerless of citizen standing before you will always be treated as the equal of the best financed and arrogant bureaucrat of the Federal Government seeking to impose his or her will on an individual citizen. We count on you for that.

You know we expect you to protect citizens from each other. Sometimes your more important duty is to protect the citizen from their own government. And I hope and trust you will both remember that through your long service in the judiciary. Mr. Chairman, thank you very much, and thank you for holding this hearing.

Chairman HATCH. Thank you. I happen to believe that being a Federal judge is one of the highest callings in the world. It is a sacred calling because I believe that the courts have probably saved this Constitution more than any other branch of government. Congress has a tendency to kick it down the drain. As you can see, from time to time, it is the courts that have to pull it back and make sure that it continues. So what you are doing is extremely important. As a member of the Third Circuit Court of Appeals myself, I have a lot of respect for that court and naturally feel that you will make an excellent addition to that court. And I intend to support both of your nominations, and I hope we can get them through in this very difficult political year. But I think we will be able to. You are both very good men, and I just wish you the best. Make us proud when you get there and remember what you said here today because I will be watching.

Judge FUENTES. Thank you, Mr. Chairman.

Chairman HATCH. OK; well, we are delighted to have you both here. We commend you and your families for being the good people that you are and setting the good example that you have and doing the things in your life and times that have qualified you to be in these positions.

Like I say, I have a great deal of respect for the Federal judiciary, and we just wish you both the best. And we will move these nominations as quickly as I can.

Judge FUENTES. Thank you, Mr. Chairman.

Chairman HATCH. Good to see you.

With that, we will recess until further notice.

ARTHUR GAJARSA
WEDNESDAY, MAY 7, 1997

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:07 p.m., in room SD-116, Dirksen Senate Office Building, Hon. Spencer Abraham presiding.

Also present: Senators Ashcroft, Sessions, Durbin, and Torricelli.
OPENING STATEMENT OF HON. SPENCER ABRAHAM, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator ABRAHAM. We will come to order. Let me just make some preliminary comments. We are checking right now to see whether or not we may have this proceeding continue in the absence of a member from--oh, great; we can proceed without a member from the Democratic side. We think Senator Torricelli will be joining us fairly soon.

Let me just begin by welcoming everybody today. We are going to be having a hearing on the nominations of four individuals for Federal judgeships: Eric Clay of Michigan for the Sixth Circuit Court of Appeals; Arthur Gajarsa of Maryland for the U.S. Circuit judgeship or the Federal Circuit; Alan Gold of Florida to be a U.S. District Judge for the Southern District of Florida; and Thomas Thrash of Georgia to be U.S. District Judge for the Northern District of Georgia.

Let me just quickly outline that because we have votes slated to begin somewhere around 2:15 today and we have a number of Senators who are here to introduce people from their States, what I

thought we might try to do was to have the introductions occur in roughly the order we just said of the various nominees and then probably break, if we can get that done in time, and I guess that means all of us who are doing introductions will have to be brief; take a break at that point and then come back and we will begin on an individual basis, going through questions of the different applicants.

Let me also just welcome the families and friends of those who are here today. Having had a number of folks from my State over the years go through this process to be nominated and finally reach this point, we know that this is not just a very difficult and tough process for the applicant; it is also certainly for the nominee's family and friends, a process that involves a lot of difficult times.

So we will ask you, if you would like, either now or later when you come back here, to please feel free to introduce anyone who is with you, that has accompanied you here today.

Mr. Thrash, welcome. We thank both Senators. We will excuse you temporarily and ask Senators Sarbanes and Mikulski and Mr. Gajarsa to join us now for introductory purposes. And, as I said, when we call you back up, if there are folks

here in the audience that should be recognized, we would like you to do that at that time.

STATEMENT OF HON. PAUL S. SARBANES, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator SARBANES. Mr. Chairman and members of the committee, it is my pleasure to come before you again to present Arthur

Gajarsa of Maryland for the U.S. Court of Appeals for the Federal Circuit. This committee reported Mr. Gajarsa favorably last year

but unfortunately, the nomination was not acted upon in the Senate before the end of the 104th Congress, and I am very hopeful that this year we will be able to carry the nomination through. He is an outstanding candidate, and a very highly respected lawyer with extensive legal experience in both public and private practice, a 1964 graduate of Rensselaer Polytechnic Institute, and a 1967 graduate of Georgetown University Law School. He also holds a masters degree in economics from Catholic University. After graduating from college and before entering law school, Arthur Gajarsa began his career as a patent examiner with the U.S. Patent Office, then worked for a time as patent adviser for the Department of Defense. He then clerked after law school for a Federal district judge in the District of Columbia, Judge Joseph McGarraghy; subsequently worked in the general counsel's office at Aetna; and then served with distinction as Special Counsel and Assistant to the Commissioner of Indian Affairs at the Department of the Interior.

All of these experiences, as well as his current private practice, make him eminently qualified to take on the issues that form the basis of the Federal circuit's caseload.

Let me just touch a moment on Mr. Gajarsa's community activities before closing. He has a long record of community service, serves on the board of regents at Georgetown University, on the board of trustees at Rensselaer, on the board of Outward Bound. But perhaps most notably, he was a founder and organizer of the National Italian-American Foundation, which he served for many years as general counsel. He is now the organization's vice president and continues to carry forward its strong tradition of community involvement and social service.

So I am very pleased to come back before this committee to recommend this very fine lawyer for confirmation to the Federal circuit. In my judgment, and I am sure the committee will conclude the same after careful examination, he has the ability, the experience, the integrity, and the commitment to equal justice under the law that we seek in all our Federal judges. I strongly commend him to the committee for prompt and favorable action.

Senator ABRAHAM. Thank you, Senator Sarbanes.

Senator Mikulski.

STATEMENT OF HON. BARBARA A. MIKULSKI, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator MIKULSKI. Thank you very much, Mr. Chairman and colleagues. I simply want to amplify what Senator Sarbanes said. I

am delighted that once again the committee is considering this excellent nomination.

When I agree to forward the nomination to the committee of a Marylander, I have two significant questions. One, does the nominee have judicial competence, which Senator Sarbanes has attested

to by the nominee's extensive background. The other is does the nominee have judicial temperament and also the character for the job?

Therefore, I look not only at the resume, not only at the articles, not only at the extensive legal experience, but look at what a person has done with his life.

This outstanding nominee has done a great deal with his life.

Born in Italy during World War II, coming to the United States, believing in the American dream, going to college, then going to night school part-time to begin to work on his law degree shows his commitment to hard work and family and education.

Then also, while busy with a career and a family, he found time

to work in the community: being on the board of the Italian-American Foundation, creating scholarships and opportunity; also, working with young people in Outward Bound; and, at the same time, participating in organizations like the John Carroll Society, which is part of a Catholic legal organization that reflects values around truth, justice, and human rights.

That is what I believe goes to judicial temperament. I believe that this is an outstanding nominee who brings great judicial competence, great judicial temperament, and this is a great opportunity to send forth to the floor a nominee who I believe will bring distinction, prudence, and good legal reasoning to the court of appeals.

Senator ABRAHAM. Thank you, Senator.

At this point we would like to place in the record a statement submitted by Congresswoman Morella.

Mr. Gajarsa, thank you very much. We will excuse you temporarily and, as I said, when you come back, please anyone you would like to acknowledge, we are glad to have that happen when we call you back up.

For purposes of information, we will take a brief recess at this time so that we can go cast our votes. There are two roll call votes that have to be cast, so it may take a few minutes before we are able to reconvene, but we will do so once that is over with, at which I will be introducing Eric Clay to the committee and we will then begin the process of question rounds.

So the committee stands in recess.

[Recess.]

We will now resume our hearing. I notice the ranks have thinned somewhat since we took off, but nonetheless we appreciate everybody who is here and everybody who has agreed to stay.

At this point I am going to suspend any further questions and, first of all, welcome Senator Torricelli and Senator Durbin. We appreciate folks coming by today. This is kind of a lonely spot up here

so I am glad to have others join us, and I'll turn to Senator Torricelli if he has any questions.

QUESTIONING BY SENATOR TORRICELLI

Senator TORRICELLI. Thank you very much, Mr. Chairman.

Let me say, before addressing Mr. Clay, how glad I am to see these nominees before the committee today. We are now facing 98 vacancies in the Federal bench. More than 11 percent of the entire Federal judiciary remains vacant. The Attorney General, before this committee only a week ago, spoke about the consequences on the administration of justice if this Senate does not begin to produce confirmation of Federal judges.

This is indeed a welcome event but as serious as the situation is, indeed these vacancies could rise to 110 in another month if indeed we do not succeed today, not only in having you address the committee, asking you questions, releasing your name for consideration by the floor, but actually proceeding to consideration.

So with the understanding that the length of my questions will not further delay your confirmation, permit me just for a moment to ask a couple of things.

I have a great concern for the Federal judiciary that as we seek the best of scholarship and professional credentials, that Federal judges also have both real life experience and some practical understanding of the system of Government in our society.

We have all witnessed, particularly as a former member of the House of Representatives, that the Federal judiciary clearly did not have a concept of congressional redistricting, how the law would impact. Indeed, we saw it again this last year on congressional financing of campaigns. In the midst of the campaign, the Federal judiciary changed the rules, I suspect considerably to its regret, and bears some responsibility for the chaos of campaign finance in the 1996 cycle.

Senator ABRAHAM. At the same time, I think it is important to indicate that of the 99 vacancies which we have before us today, there are 73 instances where there have been no candidates sent to us, no nominees. We have 26, I guess, which are now before us and of the 26, 4 which obviously we are dealing with today, there are 8 on the court of appeals, 2 of whom we are seeing today. Two others, I guess the full paperwork isn't before us, either, so hopefully that part of the process can be expedited, as well, so that we can begin to address some of these.

At this time we will turn to Senator Ashcroft.

At this time I will call Mr. Gajarsa to join us.

We will swear you in. If you'll raise your right hand and repeat after me. Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Mr. GAJARSA. I do.

Senator ABRAHAM. Welcome. As I indicated before, I would be delighted to have you provide us an opening statement, as well as to introduce anyone who is here today with you. Please proceed.

TESTIMONY OF ARTHUR GAJARSA, OF MARYLAND, TO BE U.S. CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

Mr. GAJARSA. Mr. Chairman, I have no opening statement. However, I would like to introduce several members in the audience,

my family. I have with me my youngest son Robert Gajarsa. He is the youngest of five children.

Senator ABRAHAM. Please stand up.

Mr. GAJARSA. My other children are in the midst of their final exams right now and they couldn't attend.

I also have with me Mark Berti. Mark is my nephew. He is the oldest son of my sister, my late sister.

My wife of 32 years, Melanie Gajarsa.

Senator ABRAHAM. Welcome.

Mr. GAJARSA. I am also very pleased to have with me today my dad of 90 years of age. And with respect to Dad I would like to just say one word, "Thank you". He left Italy at the age of 44 so that his children could have a better life in the United States, and my appearance here today makes him right. I just want to say, "Thank you, Dad".

Senator ABRAHAM. We thank all of you. Welcome.

Mr. GAJARSA. Mr. Chairman, I am ready for your questions.

QUESTIONING BY SENATOR ABRAHAM

Senator ABRAHAM. Well, thank you. Let me just also point out one of the jobs I have here in the Judiciary Committee is to chair the Subcommittee on Immigration, which meets occasionally in this room. A few weeks ago we had the first of what will be several hearings in which instead of focusing on all the problems of immigration, and indeed there are some. For the first time I want to

start focusing on some of the great contributions that immigrants and their descendants have made to our country, and we will, at the next such occasion, think back upon today and welcome both your father as well as yourself as further examples of a case that I think needs to be made on the benefits that immigration has brought for our country, and we welcome you.

I am going to actually go through some of the questions that I asked Mr. Clay and just ask you. You might have a little different set of cases. I suspect maybe cases from the sixth circuit might not be on your list but if you would, just start with giving me some thoughts about a judicial opinion that you think was particularly well founded, as well as any that you might wish to use as an example of one that wasn't. I would like to hear those ideas.

Mr. GAJARSA. I think one of the cases that I would like to point out was a Supreme Court case that was decided in the late 1960's, Baker v. Carr. Baker v. Carr stands out in my mind as being a watershed in the Supreme Court on the basis that it established one man/one vote rule. And in a democratic form of government, I think that is one of the great underpinnings of our Constitution. On that basis I think that Baker v. Carr stands out as one of the aspects of constitutional law that I would think creates a democratic form of government, so that one person's vote is not weighed any different than anybody else's.

Senator ABRAHAM. How about on the other side of the ledger? Are there any you think was either wrongly decided or with which you think the foundation was improperly constructed?

Mr. GAJARSA. Not so much the foundation but the aspect of some of the Indian cases. I have done a lot of Indian rights litigation for land claims and water rights claims. There is a series of cases where, in effect, Indian tribes in the past were treated as second class citizens. That has been remedied and most of those cases have now been set aside. So, in effect, the equality and access of justice under the law is available even to the American Indian tribes.

Senator ABRAHAM. Let me ask you, just to move it on a little bit, any particular justice or judge who you especially admire? If so, one or more selections, and why. I am not going to ask you the other side of this particular one. I would like to hear the good news on this. I won't ask you the other side.

Mr. GAJARSA. The good news on this, and I presume that there are a number of living justices that I admire but I would leave those aside, but the judge with whom I feel most in concert with is a gentleman that never made it to the Supreme Court. That's Learned Hand out of the second circuit. Judge Hand was a bastion of the judicial system for many, many years in the second circuit and he decided many of the issues that set the stage for financial structures in antitrust and also gave some great speeches, one in particular called "Liberty, Spirit of Freedom," which he gave in Central Park to a group of immigrants that were being sworn in as citizens in May 1944, and Judge Hand would be my idol in that regard. I think his restraint as a judge would also serve us well in today's judicial system.

Senator ABRAHAM. I thank you. I gather you might be familiar with Senator Torricelli and I will turn to him for questions at this

time.

QUESTIONING BY SENATOR TORRICELLI

Senator TORRICELLI. Thank you, Mr. Chairman. Mr. Chairman, I want to say publicly, as I said to you privately, this is an important moment for me in my new career in the U.S. Senate. The opportunity to be with Arthur Gajarsa when he faced this committee to become a U.S. judge was important to me from the moment that I was elected.

Arthur Gajarsa has not only been someone I have admired through the years but is one of my closest personal friends. He, in every way, represents what the Federal judiciary needs-his community involvement, his knowledge of our political system and an

extraordinary command of the laws of our country.

Mr. Gajarsa has been a leader of the Italian-American community in the United States and is probably one of its most respected

members of the bar. While there are relatively few people in this room, there are thousands who watch what we do here, who have an intense interest in his nomination, that he succeed to the Federal bench. I know from the President having told me personally,

his nomination is one of the most important made by the President this year, with extremely broad bipartisan support in the Republican Party and the Democratic Party, because of all that he has

represented to all of us through the years.

I will, however, also admit to a very deep conflict of interest in his nomination. The entire Atlantic City gaming community is very anxious to get him on the Federal bench so we can get him out of the practice of law, where he has represented Native American tribes. I hope that will be a successful strategy.

Arthur, there are few things that I could ask you, having known much about your philosophy and your background and your practice of law, other than to say the fact that you were born in another

country, came here, became a leader in our profession, now one of the most respected members of the bar in the District of Columbia, is a source of enormous pride to me and so many people that I know.

I will predict for this committee you will become one of the most distinguished members of the Federal judiciary. Your career will be remarked upon through the years. The things that you write and say will be widely discussed. I think this committee will be very proud that we were all part of putting you on the bench.

I do regret that this is the second time you have appeared before the committee. I know professionally it is difficult to have been nominated so long ago and yet to have your life held in limbo while you wait for confirmation. I also know, given the considerable interest in your nomination by senior members both of my party and

the other party, that I am certain that that time will pass very soon. I was more than comforted by the very kind things that Senator Abraham had to say about you, as well.

For the sake of mutual friendship, I think I should revisit one of Senator Abraham's questions. You were asked about a judge that you greatly admire. If that question is left as you answered it, without further chance to expand on a current sitting judge who I know to be a close friend of yours, who I know you admire, and you do not put his name in the record, I suspect you are going to have very many difficult evenings trying to explain your behavior before this committee.

Mr. GAJARSA. Thank you, Mr. Senator. I have had the great privilege this is quite a burden you are placing on my shoulders and I thank you for your confidence and I hope that I can carry out that confidence if I am confirmed.

One of the individuals that I truly admire who is a sitting Supreme Court justice is Antonin Scalia. Justice Scalia and I have been friends for many, many years, even before he ascended to the bench, and he certainly is a person that epitomizes the fact that Italian-Americans who are active, who do participate in the political process, who are recognized within the community, can ascend to heights. Justice Scalia is the first Italian-American to sit on the Supreme Court and I am very proud to be one of his friends.

Senator TORRICELLI. Thank you, Arthur: It is a great honor to be here with you today. We look forward to a very distinguished career. I am proud to have been your friend and very proud that you are going to be a member of the Federal judiciary.

Mr. Chairman, thank you.

Senator ABRAHAM. Thank you, Senator.
Senator Sessions.

QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. Mr. Gajarsa, I am delighted to have you here. Congratulations on being nominated to a very important court. I wish you the very best in that. I think that you have great support. People speak very highly of you. And I understand that Justice Scalia has spoken well of you, and that is important to me. I also admire him greatly.

I guess I would just sort of like to ask you, on Baker v. Carr, which I agree with you is one of the most pivotal decisions in the country. It made a move in the law that I guess the pressure was building to the point where the dam broke.

What would be your hesitations if you had to express the dangers or recognizing the need for the ruling in Baker v. Carr, do you see the other side of that issue and is that a valid concern?

Mr. GAJARSA. Well, Senator, that specific issue I think is one where the people themselves might have to decide about some of the redistricting issues and the representation which they have within their elected bodies. That is one of the aspects I think that is a balancing factor against Baker v. Carr.

But I think overall, because of what had happened up to that point, where the weighted averages were in such a way that the individual votes really were voting in one respect but were counted at a greater ratio than others, that that was probably a case that needed to be decided on that basis.

But there are obviously issues which can be argued the other way, in the sense that the people should govern themselves and through their legislative bodies, that is how they do it.

Senator SESSIONS. Well, I think you are right. So it is a tough call to say I am going to say both houses of the State legislature have to be elected on population basis or something like that, when the results may be good and you wonder what kind of opening does that give for judges to decide all kinds of other matters that other people might choose to decide differently than the court.

I was pleased to hear you mention Judge Learned Hand. I think we do need at this point in time in our American legal history to

reaffirm what I call a common sense rational approach to reading law and making honest decisions based on the plain meaning of words. I think, in a way, that's one of the characteristics that I would qualify him as, is a serious student. And some of the ideas of critical legal studies and these ideas that everything is economic forces and powers and oppressions is not a good way to interpret plain words of statutes, I don't think.

I think that by choosing him as a person you admire, I think you have said to me that you believe in enforcing the law as God gives you the ability to interpret it.

That is all I would have, Mr. Chairman. Congratulations to you and your family. I know you will do a great job on that bench and it is a special day for you and I wish you the very best.

Mr. GAJARSA. Thank you, Senator.

Senator ABRAHAM. Well, we thank you. Again, on behalf of the committee, we appreciate your coming back for a second time and regret that we are here again for you, as well, but look forward to moving this along to the full Judiciary Committee. Again, many thanks.

Mr. GAJARSA. Thank you, Mr. Chairman.

RONALD GILMAN
TUESDAY, SEPTEMBER 30, 1997
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 3:02 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Mike DeWine presiding.

Also present: Senators Hatch, Thurmond, Thompson, Torricelli, Sessions, and Ashcroft.

OPENING STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR
FROM THE STATE OF OHIO

Senator DEWINE. I would invite my colleagues, I see Senator Glenn and Senator Bennett, to come immediately to the table. We are now proceeding to hearings for two circuit court judges and five district court judges. We need to be out of here by 4:30 p.m., which I assume we can be.

I would say to all of the prospective judges who are here that it is certainly possible that we may submit some written questions for the record, either because we run out of time or because some members are not here. Some members may have to leave, so you should be prepared to receive written follow-up questions from them as well.

Senator DEWINE. Let me turn now to my colleague from the State of Tennessee, Senator Thompson.

STATEMENT OF HON. FRED THOMPSON, A U.S. SENATOR
FROM THE STATE OF TENNESSEE

Senator THOMPSON. Thank you, Mr. Chairman.

Mr. Gilman, would you come forward, please.

Senator DEWINE. I see our colleague from Tennessee, also, Senator Frist, is here.

Senator THOMPSON. Mr. Chairman and fellow members of the committee, I am pleased to come here today before you to introduce Ronald L. Gilman, the President's nominee to fill a vacancy in the U.S. Court of Appeals for the Sixth Circuit. I want to start by acknowledging my gratitude and the gratitude of all lawyers who

practice before the sixth circuit to our chairman for scheduling a hearing on Mr. Gilman's nomination so promptly.

Before I summarize Mr. Gilman's accomplishments to the committee and explain why I believe he merits the committee's approval, I want to say a brief word to recognize Judge Ted Milburn, whose seat Mr. Gilman will be filling if he is confirmed.

Judge Milburn has served the people of Tennessee and the United States as a judge for almost a quarter of a century, first as a State trial judge and, since 1983, a Federal judge. Judge Milburn is widely regarded throughout the sixth circuit as a leader on the court. On behalf of all Tennesseans, I want to thank him for his service and wish him well in his retirement. Mr. Gilman has big shoes to fill.

Let me turn now to the nominee before you today. Mr. Gilman is a native of Memphis and attended high school at Christian Brothers Academy in Memphis, from which he graduated as valedictorian. He left Tennessee for college and law school in Massachusetts, attending the Massachusetts Institute of Technology and Harvard Law School. After graduating cum laude from Harvard in 1967, Mr. Gilman returned to Memphis, where he has practiced ever since in one of Tennessee's leading law firms, Ferris, Mathews, Gilman, Branan & Hellen. I might point out that

the Mathews in that firm name is former Senator Harlan Mathews. I might also point out that my son is a member of that firm.

Mr. Gilman rapidly became established as a leader of the Memphis bar, serving as the president of the young lawyers division of

the Memphis Bar Association and president of the young lawyers conference of the Tennessee Bar Association. He subsequently served a term as president of both the Memphis Bar Association and the Tennessee Bar Association. In recognition of Mr. Gilman's leadership at the bar, he was appointed to serve on the Tennessee Court of the Judiciary, which hears disciplinary cases against State judges. He has also served occasionally as a special judge in the State courts in Memphis.

Mr. Gilman has been a leader not just in the Memphis bar but in the Memphis community, as well. He has served on the board of directors of the Chickasaw Council for the Boy Scouts of America, the Memphis Jewish Home, and the Memphis Senior Citizens

Services, among other groups. In 1981, Mr. Gilman was awarded the Sam A. Myar, Jr. Memorial Award for outstanding service to the legal profession and the Memphis community.

Perhaps most interesting of all is Mr. Gilman's membership in the Society of Memphis Magicians, which he served as president in 1986. While this gives me a little concern, I assume he will restrict himself to pulling rabbits out of his hat and not judicial decisions.

Mr. Gilman is an extremely well-qualified and unusually well-rounded nominee. While his practice is concentrated on litigation,

particularly commercial litigation, he also has engaged in estate planning and general business law. Not only is he experienced in civil law, but in criminal law, as well, as he has represented a number of indigent criminal defendants in Federal court.

More recently, Mr. Gilman's practice has focused on the practice of alternative means of dispute resolution, such as arbitration and mediation. Mr. Gilman has often served as an arbitrator and mediator for groups like the American Arbitration Association and the

National Association of Securities Dealers. With the backlog in civil litigation throughout the Nation, I think it is important to recognize the importance of the nominee's experience in this area. Not

only is this experience similar to the experience of being a judge, but it will no doubt help him bring a special insight to a variety of procedural issues to help the civil litigation system work better.

I know his wife, Betsy, is here today. I know he will want to introduce her. I want to thank again Chairman Hatch for scheduling

this hearing and you, Mr. Chairman, for presiding today. I am confident that after hearing from Mr. Gilman, the committee will favorably report his nomination and that the full Senate will confirm him promptly. Thank you very much.

Senator DEWINE. Let me turn to the other Senator from the State of Tennessee, Senator Frist. I also saw Congressman Ford back there. Congressman, can you come on up and join us?

STATEMENT OF HON. BILL FRIST, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator FRIST. Thank you, Mr. Chairman. I will join my colleague from Tennessee in welcoming the opportunity to introduce

Mr. Ron Gilman, who has been nominated to fill the vacancy in the Sixth Circuit Court of Appeals. The President has chosen wisely in his selection of Ron Gilman of Memphis, TN, to fill this vacancy

and it is an honor for me to be here to speak on his behalf.

I have heard from many Tennesseans since the nomination from across the State, and uniformly and unanimously, they have called to express their support, their full support, for this nomination. Mr. Gilman will make an outstanding judge and do a tremendous job in serving Tennessee, as well as the entire sixth circuit.

His experience, which has been outlined to you, is diverse and impressive. His reputation throughout Tennessee is fair and deliberative, all of which speaks volumes toward his integrity. I am

proud to support this outstanding nominee, was glad to have the opportunity to meet his family earlier today, and look forward to completion of this nomination process.

Senator DEWINE. Senator Frist, thank you very much.

Congressman Ford, welcome.

STATEMENT OF HON. HAROLD E. FORD, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF TENNESSEE

Mr. FORD. Thank you, and I certainly thank my Senators, Mr. Thompson and Mr. Frist, for their leadership on this. I welcome my friend and certainly the future sixth circuit jurist, Mr. Gilman, and his family. I know his wife Betsy, if she would not mind standing, and certainly his daughter, Sherry who is there in the back. I know Laura was not able to be with the soon-to-be jurist today, but I am sure she would be proud of her father.

I thank Chairman Hatch, and certainly, again, my Senators for moving this process forward in the way that they were able to and did. I would certainly say that Mr. Gilman's nomination, the way that this Senate has conducted itself, I believe, is a clear illustration of how this process can and should work when partisan politics takes a back seat to the pressing needs of our judiciary.

I thank you again, Mr. Chairman, for scheduling this hearing and I congratulate my friend, Mr. Gilman, again.

Senator DEWINE. Congressman, thank you very much.

I have a statement that Senator Leahy has asked me to place in the record. It will be made, without objection, a part of the record today.

Senator DEWINE. We will now proceed with our circuit court nominees. I would ask our two nominees to come forward. We apologize for moving everyone around, but I think that we will proceed with two panels, starting with the circuit court nominees.

As you come up, I will just ask you to remain standing and take the oath. Do you swear the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. GILMAN. I do.

Senator DEWINE. Thank you both for joining us today. We will start with Mr. Gilman. Mr. Gilman, is there anyone in the audience who is with you that has not been introduced that you would like to introduce? This is sort of a family day here today, which is just fine with me.

TESTIMONY OF RONALD LEE GILMAN, OF TENNESSEE, TO BE
U.S. CIRCUIT JUDGE FOR THE SIXTH CIRCUIT

Mr. GILMAN. Well, I appreciate it, Mr. Chairman. My wife, I believe, has been introduced, and my daughter, Sherry. Also, I have my cousins from Chevy Chase, Marian and Leon Blum.

Senator DEWINE. Let us have them all stand up, or maybe they are standing up already.

Mr. GILMAN. And I have three friends of my daughter Sherry, Rhonda Rivens, Allison Issacman, and Stuart Frisch are all here, living in the Washington, DC area. Thank you very much.

QUESTIONING BY SENATOR DEWINE

Senator DEWINE. Mr. Gilman, all of us have interest in all of the nominees. I obviously have a special interest in your nomination, because you will be serving in the sixth circuit. The State of Ohio, of course, also happens to be part of the sixth circuit.

I notice in your resume that you have worked as an arbitrator-mediator for the American Arbitration Association. I think you also

worked as a referee in the Dalkon shield litigation.

Mr. GILMAN. Yes, Mr. Chairman.

Senator DEWINE. You have written on this topic. I wonder if you could just comment for us as to whether you think our system uses mediation enough, both at the Federal level and at the State level.

Mr. GILMAN. My own experience, of course, is in the Tennessee courts and it is just coming of age. It was just this year, as a matter of fact, that the Tennessee Supreme Court adopted an official

rule for mediation. The Western District of Tennessee just set up its program this year. I believe it is something that has been quite helpful. I know the sixth circuit several years ago set up a special counsel's office to try to resolve disputes, even when they reached the court of appeals.

It seems to me a way of shortening the process of resolving civil cases and the statistics show that about 80 percent of cases that are mediated end up being resolved. So I think the parties are better off and the courts are better off because it unclogs the system a good bit.

Senator DEWINE. What is your opinion? Are we using this to its fullest potential in the Federal system?

Mr. GILMAN. It is not yet, in my own experience in the Western District of Tennessee, not being fully-but it is just in the process of being utilized. I expect, though, as I have talked to colleagues in the States of, for example, Texas and Florida, where it has been in existence for approximately 10 years, I understand it has gotten to the point in those States where you cannot go to trial until you first try mediation, and that is probably the direction that we are going in, which, in fact, I think is healthy, as particularly mediation is not binding and the parties are not obligated to settle, so

if they have to go to court, they certainly have the opportunity and the legal right to do so. But on the other hand, many of these civil cases get resolved far earlier and at far less expense to the parties than if they had to go through traditional litigation.

Senator DEWINE. Mr. Gilman, during your tenure as president of the Tennessee Bar Association, the Association drafted a professional creed for Tennessee lawyers. Is there anything particularly unique about that professional creed that we should take note of?

Mr. GILMAN. Only that probably the thing that seems most important is the need for attorneys to disagree without being disagreeable. Unfortunately, it seems to be more and more as the profession grows where the lawyers do not have regular contact with each other on a repeated basis that you find less civility in the process and that then reflects on the cost to the litigants and the

prolonging of the litigation and the need for lawyers to be able to cooperate, particularly on procedural matters that do not affect the substance of the case, but rather than just schedule a deposition date and then have problems, oh, I am going to be out of town, to talk to each other first and do things informally, where it does not affect the merits but yet it greatly aids in the case being processed through the system, and that is sort of the heart of the professionalism and the creed standards.

Senator DEWINE. Thank you.

Senator THURMOND. Mr. Gilman.

Mr. GILMAN. Senator, I think that-

Senator THURMOND. Do you want me to repeat that, or do you remember it?

Mr. GILMAN. If you would, that would be fine.

Senator THURMOND. "We look to the history of the time of framing of the Constitution and the intervening history of interpretation, but the ultimate question must be, what do the words and the text mean in our time?"

Mr. GILMAN. I think that we need to look more at the text of the Constitution as it was written. The words are important and I think that if the Constitution is to have enduring meaning, those concepts obviously have to be applied to current circumstances. New events arise all the time, but I think the Constitution has got to be interpreted within the meaning of its text.

Senator THURMOND. Now, this question is for both of you. You have both had some involvement with the American Bar Association. Do you believe that the ABA should take positions on social

and public policy issues such as abortion and aid to the homeless?

Mr. GILMAN. I would be glad to answer first. I was actually in the House of Delegates for the last 8 years. I am no longer in the House. My term ended in August of this year. I believe the ABA does a tremendous amount of good in areas like continuing legal education and professionalism and providing legal services. My own opinion is it should not, though, Senator, be involved in these issues that are primarily social and moral on which lawyers have no particular expertise, and I, in fact, have voted against those kind of resolutions when they have come up before the House.

Senator THURMOND. Thank you both for your presence and your testimony.

Senator DEWINE. Senator Sessions.

Senator SESSIONS. Mr. Gilman, I think you are correct. We do need to look for ways to develop alternatives to litigation and I think we can do a better job of settling controversies many times without the expense and the trauma of a full-fledged litigation. I am impressed that you have tried 37 cases going directly to judgment. I think that helps you bring something to the circuit that

would be a kind of experience and understanding of what it is like to be in the pit, if I might, so I congratulate you for that.

I notice that you are an Eagle Scout. I will ask you a legal opinion. Do you feel that the Washington Zoo appropriately denied the

Boy Scouts the right to have a court of honor there because the Scouts affirmed a belief in a superior being? Do you think that would be an appropriate decision for them to make under the Constitution?

Mr. GILMAN. I do not have any immediate opinion on that. I was not familiar with the issue, Senator.

Senator SESSIONS. Apparently, that has been somewhat of a controversy and I think they have backed down now, but

originally,
that was the explanation that I understand they gave. I think sometimes we do need to respect differences. We need to respect people's religious views and, under the Constitution, the right to exercise those views. I do not think they should be discriminated against because of that.

With regard to the Constitution, I think you were pretty clear about that. Do you take the view, and would you not agree that the Constitution was fundamentally a contract between the people and its government. The first three words, "We the People," shows that it was a contract with the people and we should be very careful before we alter the meaning of a contract which the people ratified.

Mr. GILMAN. I fully agree with that, Senator.

Senator SESSIONS. Thank you very much, Mr. Chairman.

Senator DEWINE. Senator Ashcroft.

QUESTIONING BY SENATOR ASHCROFT

Senator ASHCROFT. Thank you, Mr. Chairman. I appreciate the opportunity.

Mr. Gilman, I was interested in Senator Sessions' question about the Boy Scouts, who for a time were deprived of an opportunity to conduct a ceremony at the zoo because their organization espoused a belief in a supreme being. I was more interested in your response. You seemed to express some uncertainty about whether or

not that should be a disabling characteristic of an organization. Do you think that organizations or groups of people that express a belief in a supreme being should be subject to differential access to public facilities or should have fewer rights than others?

Mr. GILMAN. Oh, absolutely not. No. I think I just expressed that I was not familiar with that situation, Senator. No. I certainly would be-frankly, sounded shock that that would be a basis for denying the Boy Scouts of America access to a public facility.

Senator ASHCROFT. I would hope that that would be the way you would approach the first amendment. Thank you for clarifying that. It was not something I knew anything about, but I have come to trust my colleague from Alabama.

Senator SESSIONS. I am relying on Eagle Scout Mike Enzi, who examined that recently.

Senator DEWINE. I want to thank both of you very much and thank you for your patience. I would just again state that there may be questions from members of the committee who were not here today. They will be submitted to you in writing. On the other hand, there may not be any written follow-up questions.

Also, I would invite you, if you want to elaborate on any answer and want to submit anything in writing to us, the committee would be more than happy to receive that.

Mr. GILMAN. Thank you, Senator.

Senator DEWINE. Thank you very much.

Let me just make kind of a personal comment. As the father of eight kids, I have rarely seen children so quiet. We have a room full of children here and I congratulate all of you for staying with us.

RONALD GOULD
TUESDAY, SEPTEMBER 14, 1999
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:12 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Jon Kyl presiding. Also present: Senators Kohl and Feinstein.

OPENING STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. This hearing of the Senate Judiciary Committee will come to order.

This is a judicial nominations hearing scheduled for the purpose of considering the nominations of a candidate for judge of the Ninth Circuit Court of Appeals and five candidates for U.S. district court positions.

There will be three panels. The first panel will consist of members of the Senate and the House of Representatives who will be

introducing candidates. The second panel consists of the candidate for the Ninth Circuit Court of Appeals. And the third panel will consist of the five district court judges.

Let me at this time recognize the Members of Congress who are at the dais. Let's see here, in the proper order--and Senator Feinstein, by the way, should be joining us shortly. I should have said

that in the beginning. But Senator Moynihan, Senator Gorton, Senator Murray, Senator Wyden, and--and Representative Boehlert,

and excuse me for calling you Senator, Representative Boehlert. I didn't mean to cast any aspersions by that reference.

[Laughter.]

I would call upon you in the order that I announced your names to designate the candidates you support, and then we will see if there are other Members of Congress who would like to join the dais at that time.

Senator Gorton.

STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator GORTON. Mr. Chairman, it is with great pleasure, but pleasure as long delayed as it is great, that I introduce and commend to you Ronald Gould as a nominee to the Ninth Circuit Court of Appeals.

Since 1975, Ron has practiced law at the Seattle law firm of Perkins Coie, the largest law firm in Seattle, and I believe the only

law firm in Seattle larger than the one of which I am an alumnus, specializing in commercial litigation.

The numerous letters of support and recommendations sent to members of this committee and previously to Senator Murray and myself by both Ron's colleagues and by his clients attest to his skill and knowledge in his profession.

That admirable profession and academic record, however, while alone enough to qualify him for the Federal bench, represents only a small part of the legal and life experience that would make him a true asset to the Ninth Circuit Court of Appeals.

Ron has participated actively in legal and civic organizations and

projects too numerous to recite in full. Simply to give you an idea of the breadth of his experience, however, let me mention a few of them.

In addition to being a former president of the Washington Bar Association, Ron has served on the historical societies for the Supreme Court and the Ninth Circuit Court of Appeals. He has cochaired with Washington State Attorney General Christine Gregoire a project to develop mediation in high schools as a member of the Washington Women's Lawyers and a member of the Washington Association of Lawyers with Disabilities.

Now, when my staff assistant prepared these remarks, Mr. Chairman, he didn't realize that during the time that Mr. Gould was president of the Washington State Bar Association he helped me with a project that is of equal interest to you as it is to me, the reorganization of the Ninth Circuit Court of Appeals. And if nothing else commends him to you, I believe that that should. Senator KYL. Perhaps, Senator Gorton, we should keep that real quiet until after his confirmation.

[Laughter.]

Senator GORTON. Among the many nonlegal civic organizations in which Ron has been involved are the Boy Scouts of America, for which Ron has served on the executive board of the Chief Seattle Council since 1984; the People to People Citizen Ambassador Program, for which Ron traveled to East Asia, Japan, and Eastern Europe in the late 1980's; and on the board of trustees for the Bellevue Community College. Ron's legal and life experience has been simply extraordinary, so extraordinary that I am proud to be able to recommend him to you for confirmation to the Ninth Circuit Court of Appeals, again, with Senator Murray, with whom I have enjoyed a constructive and productive partnership in working toward fine judicial nominations emanating from the State of Washington.

Senator KYL. Thank you, Senator Gorton.

Senator Murray.

STATEMENT OF HON. PATT MURRAY, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator MURRAY. Thank you, Mr. Chairman. And I am pleased to join Senator Gorton here to recommend to the committee the confirmation of Ron Gould for the Ninth Circuit Court of Appeals. Senator Gorton is right. We have been working closely together to make sure we have the highest quality nominees, and this committee has been very helpful in moving them along. We are pleased that Mr. Gould is next in line.

Before I begin, I want to recognize the members of Ron's family who are with him: his wife of 30 years, Suzanne; their son, Daniel; and his mother, Mrs. Sylvia Gould.

Senator KYL. When people recognize you, would you at least raise your hand if not stand so we can see who you are. Thank you.

You are very welcome to be here, and we appreciate knowing precisely who is being referred to here. Thank you.

Senator MURRAY. You should know, Mr. Chairman, that Ron's mother pushed him to succeed in school and in Boy Scouts, and his wife, Suzanne, worked as a computer programmer to finance her husband's law school. So I think they are both taking credit for his being here in front of us today.

Senator KYL. As is appropriate.

Senator MURRAY. His daughter, Rebecca, who was unable to be here today is a sophomore at Hampshire College at Amherst, is a

strong supporter of her dad. Daniel, I have been told, is a jazz musician who just graduated from Stanford University and is working

to get his own Internet startup company off the ground.

I also should tell you that Mrs. Gould, his mother, is an active

81-year-old walker and swimmer, who traveled from White Rock,

British Columbia to be here with all of us today. So we are delighted to have all of you here with us today.

Senator KYL. We are pleased to have you all here.

Senator MURRAY. So let me now talk about Ron Gould. He is an excellent choice for the Ninth Circuit. He has been a partner with

the prestigious firm of Perkins Coie in Seattle since 1981. He is an

expert in antitrust, banking, director and officer liability, trade secrets and complex commercial litigation. In addition, he has served

inside the courtroom as law clerk both to Judge Wade McCree on

the Sixth Circuit and Justice Potter Stewart on the U.S. Supreme

Court.

He is also very well respected among his peers. As Senator Gorton said, in 1994, he was elected to serve as president of the Washington State Bar Association. I wanted you to know that in that capacity, he served on a project to decrease

youth violence by developing student mediator programs within our Washington State

high schools. He also convened Bar Association board meetings in

locales where he could meet with local leaders to learn how the bar

could help address youth violence programs. The program they developed was dubbed LASER, for Lawyers and Students Engaged in

Resolution, and it is now a statewide initiative that continues to attract schools interested in innovative problem solving.

Mr. Gould is also very active in higher education, serving as a

trustee of the Bellevue Community College. He also is active in the

Boy Scouts of America, where he serves as a board member.

Mr. Gould is very committed to the next generation of Americans, just as he is to law and our legal system. And I am certain

that he is going to treat those who come before him on the Ninth

Circuit with justice, fairness, and dignity. I am certain he will be

an excellent judge.

So I am very pleased that after 2 years of waiting he now has

the opportunity to be heard, and this committee and the Senate

will finally have a chance to know Mr. Gould as both Senator Gorton and I do. I have the greatest confidence that all of you will be

very impressed with him. He is an outstanding human being and

a very capable lawyer. So I urge this committee to report his nomination and look forward to voting for him on the Senate floor this

year.

Senator KYL. Thank you, Senator Murray.

Thank you very much, Senator Wyden. And I

should indicate at this point that Senator Leahy, the ranking Democrat on the full Judiciary Committee, has asked that his statement be submitted for the record, which, without objection, it will

be.

Pursuant to a brief conversation with Senator Feinstein just a moment ago, I will defer calling on her until the other members of the panel have been called upon.

Thank you very much, Senator Feinstein.

Senator Kohl, do you wish to make any kind of opening statement?

Senator KOHL. No, thank you, Mr. Chairman.

Senator KYL. All right. We will conclude our panel of introducers

unless Senator Smith should arrive, in which case we will afford

him the opportunity to speak.

Now, let me make a preliminary comment before I ask the candidates to come forward, and that is that you will see

some Senators from time to time come and go as their schedules permit. And you will not hear very many questions from the dais here, I suspect, unless there is a surprise that I am not aware of. You should not interpret that as a lack of interest in these nominees--in fact, precisely the contrary. It is my impression from the

briefing I have received and the conversations with my colleagues that I have had that the reason this panel has been put together today and the reason I think it will be very quickly forwarded to the full Judiciary Committee is that all of these nominees, through their extensive backgrounds and through the support that they have demonstrated from their States and elsewhere, have demonstrated to the members of the Judiciary Committee and the leadership, especially, and staff that they deserve to be considered for confirmation by the Senate. And therefore, again, unless there is some great surprise that I don't think that we are aware of, you will not find very many questions from the dais here. They may seem somewhat perfunctory, but I assure you that the primary point to be made here is that this hearing would not be held today and these candidates would not be before us if we expected any great difficulty. So I hope that that perhaps sets some of your minds at ease.

And since I had that chance to filibuster for 45 seconds, Senator Smith has arrived right on time, and, therefore, we will conclude our panel of introducers with Senator Gordon Smith of Oregon. Welcome. Just in the nick of time.

Now, let me call the first panel: Ronald M. Gould of Washington for the position of U.S. Circuit Judge for the Ninth Circuit.

Mr. Gould, if you would raise your right hand, do you swear the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. GOULD. I do, Mr. Chairman.

Senator KYL. Thank you.

Mr. Gould, if you have a statement, you are welcome to give that statement. If you have anyone else you would like to introduce, you are more than welcome to introduce them at this time.

TESTIMONY OF RONALD M. GOULD, OF WASHINGTON, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Mr. GOULD. Mr. Chairman, I have no statement except to say that I am very grateful for the opportunity to be here without today, grateful for the kind comments of Senator Murray and Senator Gorton, grateful that my family could be here with me today

as introduced by Senator Murray, and grateful that friends have come here today from high school, from law school, and from my professional life.

QUESTIONING BY SENATOR KYL

Senator KYL. Well, thank you. In view of the recommendations, that is probably the best opening statement you could make, and we appreciate your family being here as well.

I am going to lead with a couple of questions that are very basic in terms of your judicial philosophy and then call upon other members of the panel.

The first question I have for you is under what circumstances you believe it is appropriate for a Federal court to declare a statute enacted by the Congress unconstitutional.

Mr. GOULD. The power to declare a statute unconstitutional is a power to be exercised sparingly and only when, in my opinion,

there is specific constitutional text and authority that requires of necessity that the statute be declared unconstitutional. Each statute, Mr. Chairman, comes before a Federal judge with a presumption of constitutionality. It should be interpreted in a way to avoid constitutional issues.

Senator KYL. Thank you.

Are you committed to following the precedents of the U.S. Supreme Court faithfully and to give them full faith and effect-or force and effect, rather, even if you personally disagree with the precedents of the cases?

Mr. GOULD. Thank you, Mr. Chairman. I am absolutely committed to following the precedents of the Supreme Court faithfully.

Whether I admire them or do not admire them or like them or dislike them will make no difference whatsoever. It will be my duty

to study and understand the precedents of the Supreme Court and to apply them faithfully.

Senator KYL. Now, on some-

Mr. GOULD. If I am confirmed.

Senator KYL. Absolutely. There are some occasions, of course, on which you are faced with a case of first impression and there are no clear precedents. What principles would guide you in those kind of situations or what methods would you employ to decide a case of first impression?

Mr. GOULD. Mr. Chairman, I would first look at the text of a statute, if it is a statutory case, or of the Constitution, if it is a constitutional issue that is raised. I would look for opinions of the Supreme Court and the Ninth Circuit. But if it is a case of first impression where there are no binding precedents on the issue, then

I would look at both analogous cases of the Supreme Court and Ninth Circuit and look at cases of other circuit courts or State supreme courts or other courts of appeals in the State systems for

courts that have addressed the issues and take as much guidance as possible from that. But I would return to the text as the primary authority for decision.

Senator KYL. Do you have any legal or moral beliefs which would inhibit or prevent you from upholding a death sentence in a criminal case that might come before you as a Federal judge?

Mr. GOULD. No, Mr. Chairman. I have no qualms or reservations about imposing a death sentence in a case where-upholding a death sentence in a case where it has been properly established under the standards set by the Supreme Court, which has held a death penalty constitutional as long as certain standards are followed.

Senator KYL. Thank you.

Senator Feinstein.

Senator FEINSTEIN. I have no questions, believe it or not.

Senator KYL. Well, I can believe that because of your efficiency.

Senator Kohl.

QUESTIONING BY SENATOR KOHL

Senator KOHL. Thank you, Mr. Chairman. I have one question.

Mr. Gould, the Washington Post reported yesterday that a number of prominent appellate judges have ruled on cases involving

companies in which they own stock in violation of Federal law.

When contacted by the newspaper, most of the judges admitted "embarrassment" and said they would be "more careful" to avoid such problems in the future.

The article in no way suggested that the judges ruled one way

or another because of their financial interest in the case.

However, Mr. Gould, are you troubled by these revelations? And if so, what do you believe Federal judges should do to make sure that these types of problems, which undermine confidence in the Federal judiciary, do not occur?

Mr. GOULD. Thank you, Senator. I believe that all persons, and particularly any judge, should be troubled if there is evidence that judges have inadvertently ruled on cases involving parties in which they hold a financial interest. Each judge should establish a system, I believe, in their own chambers to ensure that nothing slips through the cracks.

Judges, of course, may elect to hold mutual funds or some investment vehicle that does not raise multiple conflicts. But if a judge chooses to hold particular stocks, then they must have a system to ensure they recuse themselves in any case where their impartiality could be questioned, and certainly in any case where they have any financial interest, however small.

Senator KOHL. Yes, I would only call to your attention that it is a violation of Federal law for a judge to have a direct financial interest. And here is a judge upholding Federal law, violating Federal law. It is a very serious responsibility, isn't it?

Mr. GOULD. Yes, Senator. I think there could be no more serious responsibility than that the judge who is going to decide the law follow the law and make clear that there is no impropriety and no appearance of impropriety in any way whatsoever.

Senator KOHL. OK. Any penalty that you would impose on a judge who knowingly violates that Federal law?

Mr. GOULD. Well, I would look to the particular Federal law that is involved, and it seems to me it is up to Congress to decide what penalty should attend any violation of it. I am not familiar with the precise penalty on this law. I also know that there are ethics provisions for the judiciary which also prohibit ruling in a case where one has an interest, and there are panels of the judiciary to address those subjects. And they are very important subjects and should be addressed very carefully.

Senator KOHL. Thank you, Mr. Gould.

Thank you, Mr. Chairman.

Mr. GOULD. Thank you, Senator.

Senator KYL. Thank you. Mr. Gould, is there anything else that you would like to say with respect to your proposed nomination?

And I don't suggest that there is any problem but, rather, just to afford you a last opportunity prior to the time that we forward your name to the full committee for its consideration.

Mr. GOULD. Thank you, Mr. Chairman. I have nothing to add except to say I am very grateful for the opportunity to be here and

to be considered by this distinguished committee and to be included with a group of distinguished nominees for consideration.

Senator KYL. Well, thank you. I know that the chairman is anxious to move the entire panel as soon as possible, and obviously we

will be in touch with you. And thank you and your family for attending the hearing.

Mr. GOULD. You are very welcome. Thank you.

SUSAN GRABER

WEDNESDAY, FEBRUARY 25, 1998

U.S. SENATE,

COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The committee met, pursuant to notice, at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Charles E. Grassley presiding.

Also present: Senators Thurmond, Specter, Sessions, Leahy, Feinstein, and Durbin.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I am Senator Grassley. Obviously, I am not chairman of the full Judiciary Committee. I am a member of the Judiciary Committee, and Senator Hatch has asked some of us, because of his very busy schedule, to help with the agenda. And so today I am doing that. I am glad to participate because we all have a responsibility to take very seriously nominees to the various courts.

With that in mind, I would like to say that today is the 16th nominations hearing held by the committee during the 105th Congress. Four of those hearings were executive branch nominees, with

the remainder being judicial nomination hearings. So far this Congress, the committee has processed 52 judicial nominees, not including the six nominees before the committee today. Of those 52

nominees, 41 have so far been confirmed. Six nominees have been reported out and four nominees are pending in the committee. Three of the administration's nominees have been withdrawn. By

comparison, in February 1990, only 17 nominees had been confirmed by February 1.

Senator Leahy is at the funeral of former Senator Ribicoff. He

has a statement that he asked to be entered in the record. And

Senator Feinstein is here as a member of the committee and as a

member of the Democratic Party. It says here we will expect Senator Feinstein here, and she is here.

Senator FEINSTEIN. Thank you.

Senator GRASSLEY. You bet. So Senator Leahy's statement will be put in the record.

I would go to Senator Feinstein, and then I

am going to go to Senator Thurmond. Or do you just have questions, Senator Thurmond?

Senator THURMOND. I just have questions.

Senator GRASSLEY. OK. Senator Feinstein, and then we will call our colleagues who are here to speak for nominees.

Senator FEINSTEIN. Yes, thank you. I have no opening comments,

and I know there is a California nominee up. I will defer to my colleague, Senator Boxer and since I am going to be here for the tour

of duty, I will withhold my comments on that nominee for a more appropriate time.

Senator GRASSLEY. The Senator from Oregon, the senior Senator and then the junior Senator from Oregon.

STATEMENT OF HON. RON WYDEN, A U.S. SENATOR FROM THE STATE OF OREGON

Senator WYDEN. Thank you very much, Mr. Chairman, and let

me express my thanks to you not just for your work here but all

the help you have given me both on the Aging Committee and dealing with our effort to bring some sunshine to the Senate. And I

thank you for your many courtesies.

I will be brief today, but it really is a special pleasure to come with my colleague, Senator Smith, and introduce Susan Graber to the committee. She is a long-time personal friend of my wife, Laurie, and I. She has a wonderful family who are here: her husband,

Bill June, and her daughter, Rachel, who is about Lilly Wyden's age, and like Lilly, she comes with her beanie babies to wish her mother luck. We are very glad that the family is here.

I also, prior to discussing Susan Graber's qualifications, would like to thank my colleague, Senator Smith. He and I have worked together every step of the way with respect to judicial nominations for our State, and he has worked, as I have, on behalf of this nominee very hard, and I want to thank him for all his help.

Mr. Chairman and colleagues, Justice Graber comes today with the strong bipartisan support of the Oregon congressional delegation, with extensive support from Oregon's law enforcement community, and with superb recommendations from both the bench

and the bar. From across our home State, from both sides of the aisle, from judges and litigants alike, we have heard praise for this dedicated jurist, who has just recently reached her 10th anniversary as an appellate judge at the age of 48.

I would also note that our former colleague, Senator Hatfield, has also been a strong supporter of Judge Graber, and I will tell you that Senator Hatfield and I years ago expressed our hope that one day Justice Graber will be serving on the U.S. Supreme Court. And I believe her qualifications are of that caliber, and we wanted the committee to know just how strongly we feel about her contribution on the bench.

She is a graduate of Wellesley College and Yale Law School, and she has excelled at every step of her legal career. And there were two points with respect to her qualifications that I wanted to emphasize.

She has authored over 300 opinions in the past 10 years and is considered in our State an extraordinary writer. I think we all know that much of what is written in the law barely resembles English. A lot of it, when you read it, the sentences don't have any beginning, middle, end, or point. And that is not the case when you read a Susan Graber opinion. And it has long been said in legal circles in Oregon that if you need someone to write an opinion well and cogently and quickly, you go to Susan Graber. And I think it is a special qualification that she brings to the bench.

The second is her strong support in the law enforcement community, which I think to a great extent stems from the fact that she

understands and respects her role as a judge. She understands the difference between being a legislator and being a judge, and her opinions reflect a firm adherence to the law as written by the Oregon Legislature. She knows the role of the judge is to follow not

make the law, and that is what we need on the Federal appellate bench.

So, Mr. Chairman, without any further speechifying, let me tell you that I think this is an extraordinary individual. She is a personal friend and one who I think will bring stellar credentials to

the bench, and I look forward to her consideration by the committee.

Senator GRASSLEY. The junior Senator from Oregon.

STATEMENT OF HON. GORDON SMITH, A U.S. SENATOR FROM THE STATE OF OREGON

Senator GORDON SMITH. Thank you, Mr. Chairman and members of the committee. It is an honor to appear before you today,

and I am pleased to join with Senator Wyden in expressing my sincere gratitude to all of you for according us this time.

I want to take this opportunity to particularly thank my friend and colleague, Senator Wyden, for his very kind remarks and also for his efforts on behalf of this nominee and on the cause of the Oregon judiciary for which we have labored together very hard to make sure that our positions are filled with good, qualified people. I am also very pleased to be able to once again work with him on another outstanding nominee from Oregon.

Mr. Chairman, while I, unlike Senator Wyden, have not personally known Justice Graber for long, I have had the opportunity to meet with her and to speak privately with her, and I have been very impressed. It is appropriate that she is here today before this committee and it is not a surprise to me that she is.

Justice

Graber has earned an excellent reputation among her colleagues on the Oregon Supreme Court and throughout the Oregon

bar. She has earned an outstanding reputation not only because of her legal scholarship, but also because of the high professional standards that she has consistently displayed in her advocacy in her private practice, and during the years she served on our State bench. I am confident that Justice Graber will bring to the U.S.

Court of Appeals the same dedication, professionalism, and integrity that has been the hallmark of her legal career.

Want to thank the chairman again or moving us to this point

in the process, and I urge the committee to complete the nomination process and to move Justice Graber's name to the floor for a

vote at the earliest possible time.

Thank you, sir.

Senator GRASSLEY. Thank you, Senators from Oregon.

We are back on schedule as far as the agenda

is concerned, so that means that we call Judge Graber and Judge

Paez. If you would come to the center two chairs there, and before

you sit, if you would stand and would each of you please raise your

right hand. I would like to swear you in. Do you swear the testimony you shall give in this hearing shall be the truth, the whole

truth and nothing but the truth, so help you God?

Judge GRABER. I do, so help me God.

Senator GRASSLEY. Please be seated. And as I have indicated before, we would like to give you both opportunities to introduce family and friends and to make an opening statement before we each ask questions of you.

TESTIMONY OF SUSAN P. GRABER, OF OREGON, TO BE U.S.

CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Judge GRABER. Thank you. It is a great honor and a pleasure to

be here today, and I would like to introduce my family: my husband, Bill June, and my daughter, Rachel. And some of our good

friends have also been able to join us, Don and Rhona Friedman

and Judge Kobervigg, and I thank them for their friendship and

support today.

Thank you.

Senator GRASSLEY. You did give your statement, or did you

want to say more in the way of an opening statement to the committee?

Judge GRABER. I have no further opening statement.

Senator GRASSLEY. OK. Then if you could, I would ask you questions, and then go to Senator Feinstein, then to Senator Thurmond,

then to Senator Sessions, or if anybody else shows up.

I also might mention that it is common practice not only for members who are here but members who can't come today to submit questions for answers in writing. And I assume that that is

about a 10-day period of time that you have to answer that. I don't know for sure. But whatever it is, find out and get answers back to us.

Let's see. Yes; that would be one administrative thing that I forgot to mention at the beginning of the hearing. So, that would not

only be for you two, but for all the nominees who are on today's agenda, including Judge Barzilay, who just was at the panel.

Do either of you have-and this would be to both of you-any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that

might come before a Federal judge?

Judge GRABER. Mr. Chairman, I wasn't sure which of us you wanted to have answer that first.

Senator GRASSLEY. OK. I would like to have you go first, Judge Graber.

Judge GRABER. Thank you. The short answer to your question, Mr. Chairman, is no; and I think to elaborate slightly, to reiterate for the committee what may or may not be obvious from the materials that you have, and that is that we do have a death penalty

in Oregon as well, and that it has, in fact, been imposed during my tenure on the Supreme Court.

Senator GRASSLEY. This would be for both of you. What are your views regarding the initiative process in the ninth circuit? We have seen a number of judicial challenges to specific initiatives. We have even had one ninth circuit panel basically say the voters weren't capable of understanding what they were doing, and so it is important to have some understanding how each of you view the process.

Judge GRABER. I can best respond to your question, Mr. Chairman, by reference to Oregon law, with which I am more familiar.

We also have an initiative process in our State, and under the State constitution, the legislative power resides with the people, and it may be exercised in one of two ways. It can either be exercised through the representatives in the legislative assembly, or it

can be exercised directly by a vote of the people.

Either form of legislation is presumed to be constitutional, and that is the same viewpoint that I would take were I to be confirmed the ninth circuit.

Senator GRASSLEY. OK. I thank each of you for answers to my questions. Would you please stay at the table?

Senator GRASSLEY. Senator Feinstein?

QUESTIONING BY SENATOR FEINSTEIN

Senator FEINSTEIN. Thank you very much, Senator.

Because Proposition 187 has been raised and I think on this committee probably the value of having judicial review in initiatives,

I just want to point out to you that I opposed 187. Because of it, I almost lost the election. I would oppose it today. Proposition 187

in my analysis would require a teacher in a school, if that teacher suspected that a youngster might be illegally in this country, to report that youngster to the INS. It would also have required a physician treating a youngster, if he or she suspected that youngster may have been in this country illegally, to report that youngster to

the INS.

Additionally, even if the youngster was legal but they suspected the parents might not be legal, they would have to report that youngster to the INS. That is my honest belief about the way the proposition would have worked.

Now, I want that proposition to be reviewed by the judiciary. I want to know whether that is constitutional or not, because that is not my understanding of the United States of America. This is a very big issue, and in California, it was on the ballot in the depths of the recession, when the infrastructure was overloaded. We are the State of many, many immigrants, and I have been, as you know, strongly opposed to illegal immigration. I sit on that subcommittee of this committee. But 187 really raises very major and serious constitutional concerns.

I do not believe in my heart of hearts that people who voted for 187 really understood-it is very complicated; this was legalese-really understood what they were voting for when they voted for

it. So, in my opinion, a judicial review of that initiative in terms of its constitutionality is entirely appropriate.

Now, let me just say to Judge Graber, I have been looking over your curriculum vitae, and I must say I look at it with such pride. You are just superbly qualified, and for me to meet a woman who sits on the supreme court of her State I think is most impressive. And so I would just like to offer you my warm congratulations. Of all the people that I have seen come up here, your curriculum vitae is certainly one of the most impressive. So congratulations.

Judge GRABER. Thank you, Senator.

Senator FEINSTEIN. If I may-and Senator Grassley asked a death penalty question-I would like to ask a question about Federal sentencing guidelines. I was just present at a swearing-in of some Federal judges in California while I was home, and I noted some grumbling about the guidelines. So let me ask you both the question.

As you know, Federal judges are subject to a range of Federal sentencing guidelines, and they require specific factual findings for departure from the guidelines. Furthermore, Congress has recently increased the number of offenses subject to mandatory minimum sentences. So I would like to ask each of you: Do you have any reservations about and are you willing to fully, follow Federal sentencing guidelines and to fully implement mandatory minimum sentences where applicable?

Judge GRABER. I have no such reservations, and I am willing and eager to apply the laws as Congress has written them. We have a State analog to those laws, and I have participated in votes upholding the constitutionality of those parallel measures.

Senator FEINSTEIN. Now, since judicial activism has raised its head on this committee and elsewhere in the United States Senate, I want to ask you a question about it. I define a judicial activist as a judge who doesn't appreciate the inherent limits on judicial authority under the Constitution and who seeks to legislate from the bench.

I would like to ask each of you: What do you understand the inherent limits on judicial authority to be under the Constitution of the United States?

Judge GRABER. Senator, the role of the judiciary, as you have pointed out, is a limited one under our separation of powers. In my writings that I have submitted to the committee, I have expressed my philosophy that a judge's role is to decide the cases that come

before the court and nothing more, not to make law, not to make policy. That is something that, as I say, I have expressed not just to this committee but in speeches and other writings, and I hope my record will support that I have tried to act by that as well.

Senator FEINSTEIN. Thank you, Judge.

Thank you very much. And a final question

on precedent. If you are confirmed as a Federal judge, at some point you might be faced with applying a Supreme Court or an appellate court precedent with which you do not personally agree.

Would you consider yourself bound by such a precedent?

Judge GRABER. Absolutely, and this is something that as a State intermediate appellate judge, which was my initial judicial position, I faced squarely and have been able to do that. Just as I

would apply a law that Congress passed that I might not agree with, because that is not what I am being asked. I would apply the precedent whether I agreed with it or not.

Senator FEINSTEIN. Thank you.

Senator GRASSLEY. Senator Thurmond.

QUESTIONING BY SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman.

Justice Graber and Judge Paez, you were present here a few minutes ago when the question came up about judicial temperament. I presume you take the same position as you heard discussed

a few minutes ago. Do you or not?

Judge GRABER. Yes.

Senator THURMOND. Justice Graber, do you have any comments on that?

Judge GRABER. No, I have nothing to add to that.

Senator THURMOND. Judge Paez--and I will ask you the same question, Justice Graber--do you believe that the death penalty should be held unconstitutional?

Judge GRABER. I agree with Judge Paez's assessment of what the U.S. Supreme Court has held. The Supreme Court clearly has held that the death penalty is constitutional, and I would apply that precedent.

As I mentioned earlier, I have, in fact, in the State court system voted on numerous occasions to uphold the imposition of the death penalty, and it had indeed even been carried out during my tenure.

Senator THURMOND. Those are all the questions I have. I wish you both well.

Judge GRABER. Thank you, Senator.

Senator GRASSLEY. Senator Sessions.

QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. Thank you, Mr. Chairman.

Frankly, I think both of you have records and friends that indicate that you are good people and have good legal skills, and I respect that. I have no quarrel with your integrity or legal ability.

And really, I am not sure how I feel about these nominations except to say that the court of appeals is one step below the U.S. Supreme Court. It sets a policy and a tone of law for an entire circuit.

Obviously the biggest circuit in the country is the ninth circuit, and most of you know--it is not a very well-kept secret--that the ninth circuit is having an awful lot of trouble with the U.S. Supreme Court.

For example, I think last year 27 out of the 28 cases reviewed by the U.S. Supreme Court were reversed by the U.S. Supreme Court, I believe 13 out of 14 the year before, or something like that

and over the years that has been a pattern since I was a Federal prosecutor. And, in fact, many prosecutors around the country or judges wouldn't even consider opinions on discovery matters and so forth out of the ninth circuit because they were out of step with the current state of the law in the other circuits.

And so I guess that is causing me to give some thought to your philosophy and the importance of correcting and getting the ninth circuit back into the right sync with the rest of the law in America.

I would like to ask you a couple of questions. On the death penalty, both of you have correctly stated that you believe the Supreme

Court has made itself quite clear on that subject. But for a number of years, at least two members of the Supreme Court dissented on that. They are no longer on the Court, but they held to the view that the death penalty was unconstitutional.

Let me ask you, Judge Graber, have you ever had occasion to express your opinion on that one way or the other as a private citizen?

Judge GRABER. No, not as a private citizen. As a judge, I have written a number of cases relating to issues involving the death penalty, and as I mentioned, I have never written a case in which set forth a theory of any kind under which the death penalty would be unconstitutional, under either the Oregon or the Federal Constitution.

Senator SESSIONS. Well, Justice Brennan, I recall, continued to dissent on every death penalty case. You are aware of that dissent, I assume, over the years.

Judge GRABER. I was aware of it.

Senator SESSIONS. If you had been on the U.S. Supreme Court, would you have agreed with Justice Brennan or the majority who held the other way?

Judge GRABER. I don't know if I could speculate what I would have done in his shoes, but I know that since I have had the opportunity to look at the arguments that have been made in front of

me, when a real case has come to me, I have never been persuaded by any of the arguments that the death penalty is unconstitutional.

Senator SESSIONS. My time is up. I might like another round.

Senator GRASSLEY. I am done asking questions, so if you have another question or-

Senator SESSIONS. Well, I would kind of like to follow up on some of your-

Senator GRASSLEY. The only thing I want to do is get done with the other panel at 4 o'clock.

Senator SESSIONS. Fair enough.

Senator LEAHY. I know that Senator Feinstein was here earlier, and so I will not have questions of our other nominee other than to wish her the best.

Judge GRABER. Thank you, Senator.

Senator LEAHY. Just as I think that we are going to have-we want to be able to move your title from justice to judge as quickly as we can. I don't think you will mind that, will you?

Judge GRABER. I wouldn't mind it at all. I would be honored, sir.

Senator LEAHY. Thank you.

Senator GRASSLEY. Thank you, Senator Leahy.

I had made the point earlier. You might get some answers to question--or get questions that you should submit answers in writing, and we would like to have those back by the

close of business

Monday.

Senator GRASSLEY. That is what the chairman's staff has told me is the deadline.

Senator SESSIONS. Senator Grassley, I have one question of Judge Graber.

Senator GRASSLEY. Yes. I hope it will be short.

QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. You filed two briefs with the ACLU on cases that are somewhat troubling to me, although they were a number of years ago-

Senator GRASSLEY. Let me clarify something right away; The record will be left open for members to submit questions through Monday. Then you will have a period of time after that to get the answers back. I am sorry.

Judge GRABER. Thank you for that clarification.

Senator SESSIONS. One in which you supported-filed a friend-of-the-court brief for the ACLU in Oregon supporting a racial preference hiring plan implemented by the Civil Service Board of Portland. Do you recall that? And do you think that brief would be appropriate today under the current state of the law?

Judge GRABER. Senator, I have a vague recollection. I know the case to which you are referring. It related to a hiring rule of the Portland Police Bureau, I believe. As you point out, it has been- Senator SESSIONS. They had been hiring on objective test scores and presumably they came into a plan to give preferences to assist people with their scores.

Judge GRABER. I don't recall the details of the rule because it has been a number of years, but to answer the second half of your question more directly, the brief that was filed was appropriate advocacy for the time but would no longer be appropriate advocacy

because the U.S. Supreme Court has now clarified the law in this area. As Judge Paez mentioned earlier, in the Adarand decision the Supreme Court has made it clear that strict scrutiny is to be applied to racial classifications and that any remedy must be narrowly tailored to respond to a specific, compelling governmental interest. So, no, that argument would not be appropriate advocacy today.

Senator SESSIONS. I think you have probably spoken well. I think at that time it was probably at the margin, but it was good-I can understand that as an advocacy. How did you come to file that brief? Were you retained and paid to, or was that a volunteer?

Judge GRABER. I can't recall for certain. The best of my recollection at this time, one of the other lawyers in the office had taken

that case as a pro bono matter and asked me to assist.

Senator SESSIONS. And you also-

Judge GRABER. That is the best I can recall at this time.

Senator SESSIONS. OK. In 1984, 2 years later, you joined with the ACLU in a brief arguing that an administrative rule limiting reimbursement for elective abortions violated the indigent woman's

right of privacy under the Constitution. Would you explain that?

Judge GRABER. Again, Senator, I have only a vague recollection of the specific arguments made in that brief because it was such a long time ago. The primary argument that was made in that

brief, to the best of my memory, was an argument under the Oregon State Constitution, which is somewhat different in its wording

and history than the Federal Constitution. And the other thing I

remember, that is memorable to me about that case was that when the Oregon Supreme Court decided it, it decided it on a basis that none of the parties had argued or thought of having to do with the structure of Oregon government and the permissibility of a rule being implemented by the emergency board.

Senator SESSIONS. Well, I don't think they would have done well to have adopted your argument in that case.

Judge GRABER. Perhaps not.

Senator SESSIONS. I can see one thing in that the right of an individual to have an abortion you could argued involved the right

of privacy. I don't agree. But this supposition it would seem to me to be outside the mainstream.

Are you a member of the American Civil Liberties Union or have you ever been?

Judge GRABER. I was for a time, probably in the early 1980's for a short while. But I don't know the exact dates.

Senator SESSIONS. Well, it is a remarkable organization. It has some fine people who are members of it. But it does adhere to a number of positions such as they oppose the death penalty, they oppose the "three strikes" sentencing laws, they are in opposition to school vouchers for sectarian schools, they oppose V-chips for television sets to limit what is shown, opposition to voluntary labeling

of albums, and support of the partial-birth abortion, support of the constitutionality on the issue of racial preferences, and the decriminalization of drugs.

Senator GRASSLEY. Is it OK if we move on?

Senator SESSIONS. Yes, sir.

Well, do you agree with all of those views? Do you have any concern about them?

Senator LEAHY. Well, wait a minute, wait a minute, wait a minute.

Mr. Chairman, I would ask if the nominee is going to be asked on specific issues that may be coming up-and, of course, that is her determination whether she wants to answer it or not is one thing. But to ask her whether she ascribes to everything in any organization, I think, goes beyond the scope of these hearings.

Senator SESSIONS. Well, there is not enough time to discuss it. I withdraw the question.

Senator GRASSLEY. OK, thank you.

Senator LEAHY. And might I say, also, Justice Graber, when you are a litigant, you are going to argue your client's side, am I not correct? I mean, you are going to argue as strong as you can for that one side, as compared to when you are a judge and you have got to listen very carefully to both sides. Would that be a fair statement?

Judge GRABER. It would, Senator, and I mentioned in response to Senator Sessions' question that the law had changed greatly since I filed that brief. And, of course, my role has also changed from that of an advocate to that of a judge, and I appreciate the difference.

Senator GRASSLEY. Thank you. We dismiss you.

Judge GRABER. Thank you.

FRANK HULL
TUESDAY, JULY 22, 1997
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:08 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Jeff Sessions presiding.

Also present: Senators Biden, Feinstein, and Feingold.

OPENING STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. We will get started. We are here this afternoon to consider a number of nominees for the Federal bench, some

outstanding nominees that I think would do credit to the Federal bench. It is an important day for you and I think you will enjoy this hearing. We will ask some questions, probably most of them not too bad, and I think you will enjoy it and I hope you will.

Senator Feingold, do you have any opening comments?

Senator FEINGOLD. I just want to thank the Chair for holding this hearing. It is an excellent group of nominees and I look forward to hearing from them and the Senators from their States.

Senator SESSIONS. Before we hear from the nominees, we have two Senators here who wish to be heard, Senator Feinstein from California and Senator Cleland from Georgia.

Senator SESSIONS Senator Cleland.

STATEMENT OF HON. MAX CLELAND, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator CLELAND. Thank you very much, Mr. Chairman and distinguished colleagues. It is an honor and a pleasure for me to introduce Frank Mays Hull, judge of the U.S. District Court for the Northern District of Georgia, and the President's nominee for the 11th Circuit U.S. Court of Appeals, who, in addition to being very talented, is also very appealing.

I am convinced this will be remembered as a historic nomination.

I believe this is the first time that a woman with such a distinguished name as Frank has been nominated to the appellate bench.

I am also convinced that this nomination will be remembered because of the sure success that she will enjoy.

Judge Hull has distinguished herself as an outstanding citizen, trial lawyer, and judge. Today, as I review her qualifications before

you, I am convinced she will continue her record of professional excellence and I am indeed pleased to be part of this process.

Judge Hull comes from a long line of natives and residents of Augusta, GA, and has deep and lasting roots in the South. The name

"Frank," though usual for a man, is admittedly unusual for a woman, and yet the story behind the name represents a wonderful legacy I would just like to share.

Judge Hull inherited this unforgettable name from her mother, who inherited it from her mother before her, who inherited it from her mother before her. Indeed, her brother, Jim, inherits his name from their father, Jim, who inherited the name from his father before him.

You got all that?

[Laughter.]

While to some it may appear her family lacked creativity with regard to the naming process, I think this family tradition does go

a long way toward explaining her sense of pride and purpose that

has lent itself to forging Judge Hull's excellent career. Indeed, the one word "Frank" carries with it the legacy and history of six generations of her family in Augusta, including literally hundreds of other family members.

Jim Hull, Frank's father, met and married Frank Inman Mays while he was in law school. They had three children, Frank, Jim, and Carol. Judge Hull's father went on to practice law with his father at Augusta's Hull, Towell, Norman and Barrett law firm.

Judge Hull graduated from Augusta's Richmond Academy in 1966 and moved north to expand her horizons, attending Randolph-Macon Woman's College in Lynchburg, VA, where she graduated in 1970.

During most of her breaks, she worked at her father's firm. She spent her junior year abroad studying at the University of Reading in England. Indeed, after completing her undergraduate studies, she received her law degree from Emory University. While at Emory, she served as an editor of the law review, was named a National Fellow of the American Association of University Women, gained membership in the Order of the Coif, and graduated cum laude. In addition, she received the Wall Street Journal award given each year to one Emory Law School senior based on overall achievement.

Frank returned home to follow her father and grandfather in the practice of law. She began as a law clerk for court of appeals Judge Elbert P. Tuttle. After this clerkship, she began a general trial practice as an associate at Powell, Goldstein, Frazer and Murphy, a prominent Atlanta law firm. There, she continued her career of achievement and became the first female partner in the then 150-member law firm. She continued her practice with Powell Goldstein until 1984, when she was appointed as a State court judge in Fulton County, GA. As a trial judge, Frank returned in front of the voters three times, and each time she was reelected. In 1994, she was nominated and confirmed for the U.S. District Court for the Northern District of Georgia.

In addition to her practice and subsequent service on the State and Federal benches, Judge Hull has distinguished herself as a servant in her community. Prior to her 1994 appointment, Frank served on the State of Georgia's Commission on Family Violence, the State Bar of Georgia's Bench and Bar Committee, and the National Board of Directors of the American Judicature Society. Furthermore, Frank is a 1987 graduate of Leadership Atlanta and a Fellow of the American Bar Foundation.

I would like to add that Frank is a member of the Cathedral of St. Philip, where she has taught Sunday school from 1983 to 1991, and assistant den mother for her son's Boy Scout troop from 1985 to 1989. Judge Hull received the Distinguished Alumnus Award from Emory University Law School in 1994 and the Honorable Rohmer, Turner, Powell Judicial Service Award from the Atlanta Bar Association Judicial Section.

Finally, but just as importantly, Judge Hull has distinguished herself as a supportive wife and devoted mother. Since 1977, she has been married to Tony Aeck, an architect with the firm of Lord, Aeck and Sargent, in Atlanta. A native of Atlanta, Tony has distinguished himself as a leader, as well, having served as president of the Atlanta chapter of the American Institute of Architects.

Tony and Frank are the proud parents of two children, 18-year-old Richard Hull Aeck, who is an Eagle Scout and an upcoming freshman at Wake Forest University, and 15-year-old Molly Hull Aeck, named after her paternal grandmother, an avid soccer player and honor student at the Westminster School in Atlanta.

Mr. Chairman and members of the committee, I have enjoyed providing you with this brief introduction of a good friend, Frank Hull. As indicated by her outstanding record and contribution to the law, her community and her country as a citizen, jurist, wife, and mother, Judge Hull represents the best our country has to offer. I am firmly convinced that she will be an outstanding appeals court judge. Thus, without a doubt, I am proud to present to you today for your consideration Judge Frank Mays Hull, the President's nominee for the 11th Circuit Court of Appeals. Thank you very much, Mr. Chairman.

I would like to recognize Senator Coverdell, the senior Senator from the great State of Georgia, who I am sure will make some fine remarks on this nomination.

Senator SESSIONS. We will be glad to recognize Senator Coverdell, and we will note that he has gotten ahead of six other Senators that have been waiting here.

[Laughter.]

You moved in very smartly there, Senator.

Senator COVERDELL. I guess that is fitting.

Senator SESSIONS. I am sure you will be talking on this same nominee and I think it would be appropriate to recognize you at this time.

STATEMENT OF HON. PAUL COVERDELL, A U.S. SENATOR
FROM THE STATE OF GEORGIA

Senator COVERDELL. Well, thank you, Mr. Chairman. I won't reiterate the biographical background which Senator Cleland has so

effectively enumerated before your committee. I would add just several points.

One, we maintain a judicial advisory panel that works alongside me, volunteer citizens, to focus on all judicial appointments, and I am pleased to report to the chairman these are very distinguished members of the bar and they have unanimously recommended Judge Hull's nomination and confirmation without any dissent whatsoever.

I would also point out that Judge Hull is a neighbor, a distinguished citizen in our community in Atlanta and Georgia, and

brings the kinds of qualifications that were enumerated in her successful career to this nomination. I would add that her first appointment to the bench was made by a very distinguished Georgian and friend, former Governor Joe Frank Harris, who was an outstanding Governor of our State of quiet demeanor, but solid purpose. And that he would have selected her, I think, distinguishes her in the case that she puts before the committee here today.

So with that, Mr. Chairman, I will allow you to move to the other six Senators appropriately. I do second and applaud the nomination, and would vote for its confirmation.

Thank you.

Senator SESSIONS. Thank you very much, Senator Coverdell.

That was a single circuit nominee. I think at this point I would recognize the Senators who wish to make remarks in order of seniority, and perhaps as we go along with that, we can do it by nominee, too.

Senator SESSIONS. I think it would be best just to go ahead and do our voting. First I would like to administer the oath lest I forget. If you would raise your hand, and do you swear

that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge HULL. I do so swear.

Senator SESSIONS. Good. We will at this time take a recess for perhaps 10 minutes, or 15, and commence as soon as we can get back from the floor. Thank you very much.

[Recess.]

We will commence.

Judge Hull, we are delighted to have you, and I am sorry we had to break for that vote. But as somebody said, that is what they pay us for here.

Would you care to introduce your family with you?

TESTIMONY OF FRANK M. HULL, OF GEORGIA, TO BE U.S. CIRCUIT JUDGE FOR THE ELEVENTH CIRCUIT

Judge HULL. I would. Thank you for that opportunity to do so.

Joining me today are my husband, Tony Aeck; my son, Richard Aeck; my daughter, Molly Aeck; my mother, Frank Mays Pride; my brother, Jim Hull; my sister-in-law, Karen Hull; my law school classmate from Emory in 1973, Terry Adamson; a family friend, Wilma Hudson from Augusta, GA; law clerks Bobby Robertson, Laura Story; my secretary of 15 years, both on State court, law firm, and Federal court, Darlene Buchanan-she is really why I am here today, among other people-and I have four former close friends, who are still close friends but former law partners, Si Lazarus and Mike Chatham, from the D.C. office of Powell, Goldstein;

Pat Norton from Alston & Bird is here as well; and Mark Eaton, also a former attorney who was with me at Powell, Goldstein.

Thank you for that opportunity to introduce them.

QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. Very good. Tell me, what are your observations about the district bench, the Federal district bench?

Judge HULL. My past 3 years on the district bench have been absolutely wonderful. I had previously 10 years in State court, in a

very high volume State court in the city of Atlanta, and I have particularly enjoyed being on district court because you do have the

time to reflect, think, research, and do some writing, which is almost impossible to do in State court.

Senator SESSIONS. And you think you like to do more writing-

Judge HULL. And I would like to do more research and writing if I am confirmed.

Senator SESSIONS. Well, as they say, be careful, you will get your wish.

The eleventh circuit has done a marvelous job of case management. They are No. 1 in the Nation in average disposition per

judge on that circuit, and I know they need to fill the vacancy.

Are you prepared for the challenges of that workload? And how do you view your responsibilities as just turning out the work of the court?

Judge HULL. Well, on the district court, I have found, just as I did on State court, that equally important to decisionmaking is case management as a judge. And I have a number of procedures

that I have found worked over the years in State court that I utilized. Two of them that helped me tremendously are:

First of all, early intervention of the trial judge, particularly in complex cases, to set a discovery schedule. As we have seen through a number of commissions, extensive discovery is what

raises the cost and delays litigation. So I believe an early scheduling order is important.

Second, there is nothing like a firm trial date. We all know that 95 percent of all cases settle, and they settle when they get a trial date, generally. So if you will just do that as a district court judge, those are two very effective tools.

On the appellate level I think equally important to case management is screening out which cases should have oral argument and

which cases basically are frivolous or clearly are without merit and do not warrant oral argument. So the screening mechanism for oral argument is utilized extensively by the eleventh circuit, and I will look forward to joining that process if confirmed.

Senator SESSIONS. I agree with you that it is not necessary to have oral argument on every case, and both the State, or the U.S. attorney, and the Department of Justice bear the cost on one side and the taxpayers usually do on a court-appointed lawyer on a criminal case. In private litigation, both the parties end up paying large sums of money to prepare for that, if it is not necessary and if the the issues are clear. I appreciate that.

Let me ask you a couple of questions just generally. Have you had occasion to enforce the death penalty in your career as a judge?

Judge HULL. While I was on the State trial court, I was assigned a death penalty case. The assignment came when I succeeded a judge who had actually tried the case and the jury had imposed the death penalty. After an appeal, the case was remanded back to the trial court level for various posttrial motions. I heard those motions, rendered an extensive opinion, which I have submitted as

one of my 10 cases to the committee. And my decision did uphold the death sentence in that case, and later my decision upholding the death sentence was affirmed by the Georgia Supreme Court. In addition to that instance, I also had some pretrial matters in another death penalty case that started while I was on the State court, and I was the originally assigned judge, but I was then elevated to the Federal district court shortly after I received that assignment. So I only heard pretrial motions in that. So those are two concrete instances where I have handled those cases.

Senator SESSIONS. As you say that, I recall well over a decade ago being in an eleventh circuit conference in Atlanta, and the Chief Justice of the Georgia Supreme Court spoke to the assembled Federal judges, and he stated-I thought it was a remarkable statement-that in his opinion the Federal court was systematically undermining the lawful implementation of the death penalty.

I thought that was a very serious commentary.

I do believe that the Federal courts are doing better now in enforcing the law as it has been affirmed by the Supreme Court in allowing death cases when they are proper and ready to be affirmed, but I think that is one of the things that has undermined

public confidence with the judicial branch, that we go beyond what judges were lawfully empowered to do.

To me, within the Constitution itself, there are four to six different references to capital crimes, and you cannot take a life without due process. So presumably States are empowered to take a life with due process. And I am glad we are making progress in that regard. I think that you will faithfully follow the law whether you like it or not. At least that is your reputation.

Senator Feingold, do you have any questions?

QUESTIONING BY SENATOR FEINGOLD

Senator FEINGOLD. Yes, Mr. Chairman. First, I would like to ask unanimous consent that a statement by the distinguished ranking member, my friend from Vermont, Senator Leahy, be introduced into the record at this time.

Senator SESSIONS. Without objection, it will be entered.

Senator FEINGOLD. Thank you, Mr. Chairman. Congratulations,

Judge Hull. You have had the advantage, as we have already mentioned, of having served for over 16 years as a judge, both at the

State level and the Federal level. And I am wondering how serving

in the different levels of the State versus Federal courts has affected your view of those respective courts in our system and their

roles.

Judge HULL. Well, I think it has affected my view. As a trial lawyer for 10 years, frankly, most of my cases were in Federal court.

And I would have felt reasonably confident in my abilities to be a

Federal trial judge. But after having had 10 years in State court,

hearing thousands of cases each year, there is nothing like that for

preparation because the caseload is so heavy. And I think they

both are equally important courts.

As you are probably aware, State courts probably handle 10

times the volume of litigation that you do in any given State in a

Federal court. So I think it has been wonderful experience, and I

think it has given me a deep respect for what our State court

judges do. And I think it does have an effect on my judicial philosophy because I was a State judge before I was a

Federal judge, and

I think some of you who have served in the State legislatures can

identify with that.

Senator FEINGOLD. Exactly that reaction, having served in the

State senate in Wisconsin.

Why is it that you want to move to the court of appeals at this

time? I heard your reference to wanting to do research and writing.

Are there further reasons?

Judge HULL. Yes, there are a number of reasons in addition to

that. First of all, as you may notice on my resume, my first job was

clerking as a law clerk on this very court back when it was the

combined fifth circuit before the split. So I feel very confident that

I know what the job is like.

It is not something you dream about because there are so few positions and the odds of ever getting there are so

remote. But it has

really been a personal goal of mine to one day be an appellate

judge, either on a State court or a Federal court. And I had 10

years of law practice, 13 years as a trial judge, and I now feel prepared for new challenges. I have been trying cases 13

years. I love

it. But I am ready for, frankly, some new challenges, and I hope

I have something to add.

Senator FEINGOLD. Thank you, Judge.

One other issue. Recently on this committee we have heard a lot

about the issue of judicial activism. My understanding of that term

is that a judicial activist is a judge who does not appreciate the inherent limits on judicial authority under the

Constitution and who,

in effect, tries to seek to legislate from the bench.

You have already answered in writing questions on judicial activism as a part of your questionnaire. But I would like

to just ask

you, sort of following on the chairman's questions: Do you appreciate the inherent limits on judicial authority under the Constitution?

Judge HULL. I certainly do. And I hope my track record speaks volumes to that, showing that I have so acted.

Senator FEINGOLD. Thank you, Judge. And if you are confirmed as a Federal judge, do you plan to legislate from the bench?

Judge HULL. I do not.

Senator FEINGOLD. Thank you, Mr. Chairman.

Senator SESSIONS. One question. From your experience as a district judge, a Federal trial court judge, you will be reviewing your

brother and sister judges' opinions. Do you have any views that could help them improve their case management? Could the appellate courts render some opinions or move in certain directions that

would help improve court management?

Judge HULL. Well, I inherited a caseload when I came to the Federal district court, and I have substantially reduced it and kept it fairly current. And I find the most effective way to do that is one-on-one discussion with other judges, both with my colleagues at

lunch and at judicial conferences. And I have had a number of them confer with me about how you have done that and so forth, and I really think the interchange among judges—we learn, as I am sure Senators do from each other, a great deal by having lunch together and talking about these things.

But I really think the two things I mentioned, taking control of the case early on—now, sometimes cases that the lawyers get along fine and they are doing OK, you also should leave them alone, too. Sometimes you can interject yourself and cause more problems. But generally, if a dispute arises over discovery, I think you better jump in and get that case on a schedule and take control of it. And as I said, I firmly believe setting a trial date is the No. 1 thing you can do to control your caseload. Basically people want to be heard and want to get to trial.

Senator SESSIONS. On the appellate court, do you have any observations that you would share with us about readiness of the appellate courts to grant or affirm summary judgment, some motions to dismiss? Do you have any thoughts on that?

Judge HULL. I do, and I can only speak directly to the eleventh circuit. As a State court judge, I am afraid I found our appellate courts in the State system were not as willing to affirm summary judgment. I have had a totally different experience in the eleventh circuit. They have adopted some summary judgment rules that I think are good, and I heard the chief judge speak at a conference recently; 40 to 45 percent of the cases that the eleventh circuit sees involve summary judgments grants. And our courts, particularly the Federal courts, are resolving almost half the docket now based on either a grant or a denial of summary judgment.

Senator SESSIONS. Are you comfortable—

Judge HULL. Generally, a grant of summary judgment for either the plaintiff or the defendant, and I am very comfortable with that. That is, a day in court doesn't necessarily mean a jury trial. A day in court means a day in court and being heard and having your case fully briefed. And if there are issues of law that dispose of the case, then so be it.

Senator SESSIONS. I have had a lot of lawyers tell me they have

dispositive motions, that if the judge would just rule on them, the case should be over; yet they spend months doing expensive discovery and prolonged litigation and it could have been ended. I think you are correct on that.

We are delighted that you have been here. We appreciate your comments. Do you have anything else you would want to share with this group?

Judge HULL. Just thank you for allowing me to introduce my family members and friends again. Thank you.

Senator SESSIONS. Thank you very much.

ROBERT KATZMANN
WEDNESDAY, JUNE 16, 1999
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:59 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Thurmond, Sessions, Smith, Leahy, Kennedy, Feinstein, and Schumer.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. We are just a minute early, but I think we will start, anyway. How is that?

Today we are holding a judicial nominations hearing for 8 nominees—that is rather rare—2 circuit nominees and 6 district court

nominees. Now, this hearing follows the committee's approval of 2 judges earlier this year, and I note this hearing is approximately 3 months earlier in the year than the first hearing for circuit and district court nominees in 1993, when I was in the minority on this committee. Also, I note that there was only one hearing for circuit and district court nominees in all of 1993.

It is my expectation that the work of the committee will continue at a reasonable pace throughout this year. This is important work and I take it seriously, and we will continue to do our best.

Of course, the committee cannot approve nominees that have not been sent to us by the President. As the Chief Justice noted in his most recent report on the judicial branch: The entire Sentencing Commission is vacant. We have seven seats that are still vacant, and not a single nomination has been made. Without any commissioners, no Sentencing Guidelines can be passed for new criminal

statutes, no modifications can be made to existing guidelines to address issues raised by the courts. So I look forward to working with

the President and others to ensure that this important Commission can obtain a slate of Commissioners and get back to work this year.

Together, Senator Leahy and I have ensured that the President's nominees receive a fair hearing and that Federal courts are adequately staffed to perform their constitutional function.

This committee has been instrumental in the Senate's confirmation of 306 judicial nominees and over 200 other nominees by President Clinton. By conducting thorough but expeditious reviews of nominees

and by holding hearings, we should be able to keep the number of vacancies from inhibiting the work of the Federal courts and other bodies.

I am confident that by the end of this session the committee will have done a fair and even-handed job of evaluating and approving judicial nominees just as it has done in previous years. I look forward to working with my colleagues on the committee to accomplish this.

Now, today we have three panels. The first panel will consist of the sponsors of the nominees who will make short statements on behalf of their nominees. The second panel will consist of the two circuit court nominees, and the third panel will consist of the six district court nominees.

So if I could call those who are going to speak for the judges forward. Senator Lott and others, if you will take your seats here, we

would appreciate it.

Excuse me. Senator Kennedy is here. We will be glad to turn to him.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you, Mr. Chairman. I wanted to express my appreciation for scheduling the hearing, and we look forward to our pending nominees.

We know the magnitude of the task before us. There are currently 65 vacant judgeships in the Federal judiciary; 12 additional

vacancies are likely to open up in the coming months when more and more judges retire from the Federal bench. Of the 65 current vacancies, 28 have now been classified as judicial emergencies by the Judicial Conference of the United States, which means they have been vacant for 18 months or more. In the District of Western Pennsylvania, one position has been vacant since November 1994, 4 1/2 years, inexcusably long by any standard.

So I want to commend you, Mr. Chairman, for having the hearing. I look forward to working with you so we deal effectively with

the backlog and meet our constitutional responsibilities in the confirmation process.

I thank the Chair.

Chairman HATCH. Well, thank you, Senator Kennedy.

I think we will turn to the distinguished Majority Leader first

and then Senator Cochran and then, if I could, I will turn to the distinguished Senator from New York. I will try and do this, if I

can, on a seniority basis. If Senator Daschle arrives, we will interrupt and allow him to make his speech because we know our leaders have a lot to do in addition to all of us, but we will show that kind of deference.

So, Senator Lott, we are happy to hear from you.

STATEMENT OF HON. TRENT LOTT, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator LOTT. Thank you, Mr. Chairman, Senator Kennedy, Senator Leahy, and my colleagues here on the panel. I was just noting

to Senator Lieberman and Senator Dodd-

Chairman HATCH. Senator Lott, if I can interrupt you, the ranking member is here and he wants to make his statement.

Senator LEAHY. No, no. That is all right. I am just very excited to be at our first confirmation hearing this year, the longest the Senate has ever taken to hold a hearing in the 25 years I have been here. I am so excited that I really wanted to be here and see this.

I will submit a statement. I don't want to hold up this distinguished panel, all of whom are good friends.

Senator LOTT. Thank you, Senator Leahy. And, Mr. Chairman,

again, I was just saying with this panel, if we could do a little legislative business while we were here, there is no telling what we

could get done right here at this table.

[Laughter.]

Chairman HATCH. This is a good bunch to do it with.

We will turn to Senator Moynihan and then Senator Schumer, and then we will turn to Senator Dodd after that.

STATEMENT OF HON. DANIEL PATRICK MOYNIHAN, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator MOYNIHAN. Thank you, Mr. Chairman, Senator Leahy, and distinguished members of the committee. I have the honor and great personal pleasure to introduce to this committee a brilliant

lawyer and scholar, Prof. Robert A. Katzmann, the Walsh Professor of Government and Professor of Law at Georgetown University. He comes to you as the nominee for the Second Circuit Court of Appeals.

Upon his nomination, I stated that "Robert Katzmann is the finest lawyer/scholar of his generation. He will serve the Court of

Learned Hand with honor and distinction."

His distinctions began early, sir. He graduated summa cum laude from Columbia, took his master's and Ph.D. at Harvard in government, and has his juris doctor from Yale Law School, where he was an article editor of the Law Journal. After clerking in the U.S. Court of Appeals for the First Circuit, he joined the Brookings Institution and has been there and at Georgetown since.

He is the author of many books. A citation from the University of Oregon captures the spirit of his work. It says: "He has committed himself to interdisciplinary research that is often applied

rather than pure academic scholarship. That work seeks to make a 'real world' difference." A principal thrust in his career has been a concern with the practical aspects of the legal system. An example is his involvement over the past 2 decades with the Federal Judicial Center, which asked him to bring to fruition a project on managing appeals in Federal court. The result was "Managing Appeals in Federal Court," the leading study of its kind, as I believe.

A major focus of his career has been a project to enhance the understanding between the judicial and the legislative branches, as

explained in his recent book, "Courts and Congress."

Judge Diarmuid O'Scannlain of the U.S. Court of Appeals for the Ninth Circuit described this book as "most timely and insightful", indeed, "must reading."

I believe, sir, you would recall that more than a year ago we met with you and your staff to discuss one of his projects, an effort whereby court opinions identifying perceived problems in statutes are sent from the courts of appeals to Congress for its review. The project holds the promise of enhancing mutual understanding of each branch's workways.

May I finally say, sir, apart from his professional accomplishments, on a personal note, I can attest to his unquestioned integrity and fairness. I thank you for your great courtesy.

Chairman HATCH. Thank you, Senator Moynihan. I appreciate the high praise that you have given.

Senator Schumer, on this nominee.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman, and I would like to take this opportunity to commend you for holding this hearing and add to the introductions and praise for Professor Katzmann as well as Marsha Berzon.

I can hardly hope to match the eloquence of my colleague or the erudition from New York's Senator Moynihan, so I shall not try. I simply want to commend him for recommending the nomination of such a fine candidate for the Second Circuit as Robert Katzmann,

and I look forward to working with you, Mr. Chairman, to bring Dr. Katzmann's nomination to the floor and for his eventual confirmation.

Dr. Katzmann's extensive research and writing and works on matters relating to the Federal judiciary are indeed impressive.

Senator Moynihan has catalogued some of the works of Dr.

Katzmann, although in all modesty he left out my favorite, which

was his recent book entitled "Daniel Patrick Moynihan: The Intellectual in Public Life."

[Laughter]

Anyway, in the interest of time-

Chairman HATCH. Don't make it rougher than it is. OK?

[Laughter.]

Senator SCHUMER. In the interest of time, I will say no more except to thank you, Mr. Chairman, for the opportunity to testify at this hearing.

Chairman HATCH. Thank you, Senator Schumer.

Senator MOYNIHAN. Mr. Chairman, may I say I last year introduced Ms. Berzon to the committee, and Senator Feinstein will add

a statement I have made at the conclusion of her statement.

Chairman HATCH. Thank you, and we recognize your strong support. This has been good praise for your nominee, Mr. Katzmann,

and for Ms. Berzon. We appreciate it.

We would be glad to release you from the table. We appreciate you taking time from your busy schedules to be here.

Chairman HATCH. OK.

If I could have all the judgeship nominees stand and be sworn,

we will swear you all in. If you could just stand, raise your right

hands. Do we have all of you up there? OK Do you swear the testimony you shall give in this hearing shall be the truth, the whole

truth, and nothing but the truth, so help you God?

Mr. KATZMANN. I do.

Chairman HATCH. Thank you very much. I think what we will do,

I think we will start with the two circuit nominees: Marsha S.

Berzon and Robert A. Katzmann. And then we will go to the district court nominees in the second panel-third panel, rather.

Senator LEAHY. Mr. Chairman, at an appropriate point, I have two statements from Senator Feingold that I want placed in the record.

Chairman HATCH. Without objection, we will place them in the record. Please take your seats.

Senator LEAHY. Mr. Chairman, while I did not give an opening statement, I would put my statement in the record.

I do want to point out again on the hearings that

we should not compare this to 1993, the President's first year, as

compared to the seventh year of a President's term in office. The

first few months of that administration we had a confirmation of

a new Attorney General that took four hearings over 3 months. We

had 6 days of hearings in May and June of other top Justice Department nominations and a Supreme Court nomination. This year

we have not had a hearing on executive branch nominations, and

the average time for Senate action on the judges confirmed was

about 200 days.

Chairman HATCH. Let's be glad we are having a hearing now.

Senator LEAHY. I am delighted, and I compliment you on that.

I really do. And I mean that most sincerely.

Chairman HATCH. We are happy to welcome both of you here. We

hope you will introduce your family members and friends that you

have with you, and if you have any statement you would care to

make, we will start with you, Ms. Berzon, and then with you, Mr.

Katzmann.

Mr. Katzmann, we will turn to you. Introduce

your family and friends or whoever you have with you.

TESTIMONY OF ROBERT A. KATZMANN, OF NEW YORK, TO BE
U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT

Mr. KATZMANN. Mr. Chairman, I would like to thank you for your great courtesy and the courtesy of your staff over these past several months, and also Senator Leahy. I would like to introduce my parents, John and Sylvia Katzmann; my brothers, Gary Katzmann, who is a career-my identical twin brother, Gary Katzmann, who is a career prosecutor in the U.S. Attorney's Office; my brother Martin Katzmann; and my many friends who are here as well. My sister, Susan, unfortunately, could not make it, and her family as well.

Finally, I would like to say a special word of thanks to Senator Schumer and Senator Moynihan for their very generous introductory remarks. Nearly a quarter century ago, Professor Moynihan

prepared me for my generals in American Government at Harvard, and in the ensuing years, there is no one who has had a greater impact on my life in his role as teacher, mentor, and friend. And I am so grateful to him and to Liz Moynihan and to Michael Patrick for coming here today. They are really friends for hard winters.

Thank you.

Chairman HATCH. We are happy to welcome your family and, of course, we are very proud of Senator Moynihan ourselves. He has been a great Senator. He came to the Senate at the same time I did, and so we have been good friends all through these years.

We are happy to have both of you here. Now, we have a roll call vote, so I hope that some will go vote now and then come back so you can ask questions.

Senator SESSIONS. Mr. Chairman, I am supposed to preside at 4 o'clock. I don't know if others have a pressing need, but if you could allow me a few questions at the beginning. If not, I will understand.

Chairman HATCH. I will be happy to yield my time to you Senator, and we will let you take the time, and then if others could go vote and then come right back, then Senator Leahy and I can go.

Go ahead, Senator.

QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. Thank you, Mr. Chairman. I think both of these are extraordinarily skilled lawyers, and I appreciate your abilities, and I did enjoy very much, Ms. Berzon, our conversations.

Chairman HATCH. If we could begin, I apologize for the delay. I am going to put the written questions of Senator Thurmond into the record, and I would hope that you would answer them as quickly as possible. He directs questions to both you, Ms. Berzon, and you, Mr. Katzmann, and then he sends questions to the other judges as well. So I would hope that you would answer any and all written questions as quickly as possible. We will keep the record open to have written questions to the nominees until Friday, the end of business on Friday, if that is all right.

[The questions of Senator Thurmond are located in the appendix.]

Now, Senator Smith, would you like to ask some questions or would you like me to go ahead?

Senator BOB SMITH. Go ahead, Mr. Chairman. I will be ready in a minute. Why don't you go ahead?

QUESTIONING BY SENATOR HATCH

Chairman HATCH. Thank you. OK.

Now, you have heard the questions, Mr. Katzmann, of Senator Sessions. Do you have anything to say about those particular questions?

Mr. KATZMANN. No, I don't.

Chairman HATCH. OK; how would you answer them?

Mr. KATZMANN. The questions that were asked were in a sense-most of the questions seemed to be particular to various cases.

Chairman HATCH. Right, that involve California, so you really don't have anything to say about that.

Mr. KATZMANN. Right.

Chairman HATCH. OK; I presume you will, too, Mr. Katzmann.

Mr. KATZMANN. Absolutely.

Chairman HATCH. Now, Mr. Katzmann, the Founding Fathers believed that the separation of powers in a government was critical

to protecting the liberty of people. Thus, they separated the legislative, executive, and judicial branches into three different supposedly co-equal branches of government, the legislative power being the power to balance moral, economic, and political considerations and make law, the judicial power being the power only to

interpret laws made by the Congress and by the people.

Now, in your view, is it the proper role of a Federal judge when interpreting a statute or the Constitution to accept the balance struck by Congress or the people or to rebalance the competing moral, economic, and political considerations?

Mr. KATZMANN. I firmly believe that it is the role of the judge to accept the balance struck by the Congress and the people. It is inappropriate for a judge to reorient the calculus.

Chairman HATCH. Making of law to me is a very serious matter. To make constitutional law, two-thirds of each House of Congress and three-quarters of the States must formally approve the words of an amendment. To make statutory law, only a majority of each House is necessary, and usually the President must formally approve the words of a statute.

This formal approval embodies the expressed will of the people through their elected representatives and thus raises the particular words of a statute or constitutional provision to the status of binding law. Words, theories, and principles that lack this formal approval are not backed by the will of the people and thus do not rise to the level of legitimate law.

Would you agree that the further a judicial opinion varies from the text and the original intent of a statute or constitutional provision, the less legitimacy it has?

Mr. KATZMANN. I certainly do agree with that. I think in an article, which I, frankly, quoted in my book, "Courts and Congress,"

which you wrote in the Harvard Journal of Law and Public Policy, you talk about the slippage that can occur the further one gets away from the text of the statute. And I believe that clearly that is a problem if a judge inserts his or her own views about what a statute should mean by moving away from the words of the statute.

Chairman HATCH. Let me ask both of you this question: Under what circumstances do you believe it appropriate for a Federal court to declare a statute enacted by Congress unconstitutional?

Mr. KATZMANN. I think, Mr. Chairman, that a court should be very wary about declaring unconstitutional an act of Congress.

When you look at the constitutional structure, there is article I, the legislative article, article II, the executive, and article III, the judiciary. I would submit that the order suggests that there should be

caution on the part of the judiciary in terms of upsetting the law that Congress has made. So I believe that only in the rarest of circumstances would it be appropriate to declare an Act of Congress

unconstitutional. There would have to be clearly a very compelling reason to do so. It would have the presumption-an Act of Congress has the presumption of constitutionality.

Chairman HATCH. Thank you. My time is up.

Senator Smith, do you have questions?

QUESTIONING BY SENATOR SMITH

Senator BOB SMITH. Thank you, Mr. Chairman. Good afternoon to both of you.

Is that your view as well, Mr. Katzmann?

Mr. KATZMANN. Yes; the Supreme Court has firmly spoken on that issue, making note of a number of clauses in the Constitution which suggest that there is room for capital punishment.

Senator BOB SMITH. Do either of you have any moral or religious or any other personal convictions that would keep you from voting to apply the death penalty in an appellate case?

Mr. KATZMANN. Neither do I.

Senator BOB SMITH. On the issue of judicial precedent, what is your view on judicial precedent? I think Senator Leahy asked you about judicial precedent, and I missed that. I think you replied that you supported judicial precedent. Is that correct?

Senator BOB SMITH. Is that your view as well, Mr. Katzmann?

Mr. KATZMANN. Yes; I think that if you don't follow precedent, you are inviting judicial activism, which I would deplore.

Senator BOB SMITH. Well, let me ask you a tough question on judicial precedent. Were you to have been on the Supreme Court in 1867 when the Dred Scott case came down, Judge Taney indicated in that decision, the majority decision, that Dred Scott was a personal property and, therefore, could not sue in Federal court. We now had precedent that was never overturned by the courts, but it was overturned by some amendments to the Constitution. So if you had had the chance to vote to reverse that judicial precedent, how would each of you have voted?

Mr. KATZMANN. I would emphasize, too, that in terms of the position for which I am being considered as an appellate judge, I am

bound to follow precedent. The issue as to what I would do if I were a Supreme Court Justice is not something that I have actually fully considered at this moment. But in the case of Dred Scott,

when we think about precedent, there are a lot of different questions that one might think about.

One issue might be how long has the precedent been in existence, how long has it stood in existence. That might be of some use.

But, on the other hand, if you always stick to precedent at the Supreme Court level, then you would never have had a reversal of

Plessy v. Ferguson.

Senator BOB SMITH. That was my next question.

Mr. KATZMANN. So that there are circumstances in which at the Supreme Court level, where because there is a recognition that a decision was clearly wrong, that there may be some basis for a change in precedent. But at the appellate level, I think the obligation of the judge is to follow the precedent regardless of whether

the appellate judge agrees with it or not.

Senator BOB SMITH. No, I understand, but the issue in a generic sense was judicial precedent, and I think you both admittedly stated that you didn't feel that would necessarily be the

case at the appellate level. You did give a qualifier on both your answers. I just want to make sure the record is straight. You both gave me a qualifier on judicial precedent on both Plessy v. Ferguson, which was overturning segregated schools, and Dred Scott, which was not allowing a black man who was considered property to sue in Federal court. So you did give two qualifiers. I don't want to misrepresent what you said, but that is the way I read what you said. So now I am going to get you to the least controversial of all the questions I have asked so far, but that is why I wanted to hear your answers to these questions first, which is-I was being funny-the issue of abortion, which is obviously one of the most controversial issues of the day. So if we use the issue of judicial precedent in Roe v. Wade, what is your view on Roe v. Wade, each of you?

Mr. KATZMANN. As an appellate judge, I am bound to follow the precedent of the Supreme Court. Casey is, in a sense, the defining case as it modifies Roe v. Wade, suggesting that restrictions on abortion would be upheld so long as there is not an undue burden. As an appellate judge, I am bound to follow that regardless of my own personal preferences.

Senator BOB SMITH. In a personal sense, if both of you could answer this, do you believe that an unborn child is a human being?

Mr. KATZMANN. My concern, Senator, is that when judges enact their personal preferences, whether for or against a particular issue, there is a danger of judicial activism. It is a recipe for judicial activism because it then means that judges pick and choose

what they want to enforce in the law according to their own personal preferences.

What I can say to you is that I will faithfully apply the law as the Supreme Court has laid it down, whatever the precedent of the Supreme Court might be in that area at any time.

Senator BOB SMITH. Well, look, and I want to say to both of you I appreciate the fact that you are answering my questions. That is not always the case here, and you are, I think, making an honest attempt to answer the questions, and I appreciate it. But I think

what we have in the case of-I agree with you on judicial activism on either side of the political spectrum. I am not in favor of judicial activism. I think that judges and Justices should support the Constitution pretty much in a constructionist way as it is written.

The difficulty for me, and I think for many, on Roe v. Wade is that by making abortion the law of the land, many would say there is nothing in the Constitution that would provide for that kind of decision to be made. There is no mention of abortion in the Constitution. There is mention of life and the protection of life, but there is no mention of abortion.

And so I think what we have here is an opportunity to say that a life could be taken at any stage; although it is not frequently done in the third stage, there is no restriction on that. And that is the reason I am asking the question. Does the unborn child have a right to life at any point during the 9 months of pregnancy? And if so, at what point? And I think that is a fundamental question that I don't think is an unfair question for a person who, although it is the appellate court, could very well at some point be considered at a higher court, and also very well could face a decision

dealing with that issue on the appellate court.

So that is the question that I would like to ask. Does the unborn

child have a right to life at any point during the pregnancy? And if so, when, in your view?

Mr. KATZMANN. I think that the Court recognizes that the State has an interest in the protection of the child, but there are these competing interests and concerns. One is bound to follow the precedent of Casey, and I think that in a sense, if I might say, that when there are nominees to the Supreme Court, that is where one can really change, if one wants to, influence the direction of policy because at the appellate level you are supposed to follow the precedent regardless of how one personally would come out on a particular issue. I know that is an answer of judicial restraint, but I firmly believe it.

Senator BOB SMITH. Well, let me move it all the way to the end to the most dramatic of all abortions, which is the so-called partial birth abortion. There is a possibility, although not likely, that we will overturn the President's veto on this. Were that to happen, it would be in the courts, and the constitutionality would have to be determined of that act.

Is the partial-birth abortion ban, as we now know it, the law, the bill that has been passed that has not become law, is that in your view constitutional or unconstitutional as you interpret the Constitution?

Mr. KATZMANN. I would say that that is an issue that--Senator, that is a very important issue, and that as a judge, I would really have to evaluate that issue in the context of a law that is actually passed, and then in terms of a case or a controversy. In terms of adjudication, there are restrictions on judges rendering advisory opinions on particular pieces of legislation in the advance of passage. And then even after passage, I think what a judge has to do is to evaluate the case in the context of a real case or controversy.

I think the questions that you raise are very important ones and serious ones, and you can be sure that if I ever had a chance to rule on that kind of an issue, I would really be as faithful as I could to the Constitution, recognizing the presumption of legislation to be constitutional.

Senator BOB SMITH. And I would say just for the record--and I am not looking to argue; I have learned after many years of this that arguing doesn't do any good, but discussing sometimes does. I would argue that in the case of Ferguson, segregation was a horrible situation, as was the situation of determining that a black person was property and therefore had no legal right to sue. Those were both dramatic departures from the norm from what is right and wrong in America.

And I would venture to say I would add number three to that, and that is the taking of a life of an innocent unborn child, 35 million of which, 35 million of which, have been lost since the Roe v.

Wade decision in 1973. They will never have a chance to be a judge. They will never have a chance to be a mother or a father because of a law that was passed--a Court decision that was made, excuse me, which denied them that opportunity.

And neither one of you are willing to sit here and tell me that you think that is wrong. Is that correct? I mean, I haven't heard anybody say it yet. So 35 million children never have a chance to be here or to be up here or to be out there and have the opportunity to live their dream because of a Court decision. And had it not been for the guts of somebody in Ferguson and the guts of somebody who wrote those 13th, 14th, 15th amendments, we may still have slaves in this country that would never be able to sue. And we may very well have segregation in this

country.

Chairman HATCH. Senator, if I could-

Senator BOB SMITH. A last point, Mr. Chairman. You have been very patient.

Chairman HATCH. Yes.

Senator BOB SMITH. And I think in this particular case, I would add abortion to that list, and I would say that 35 million children lost

is a terrible comment on American society. And I deeply regret, really, with all due respect to both of you, that neither one of you can say that.

Chairman HATCH. Well, Senator, if I could interrupt, you have asked some very appropriate and good questions. I interpret it a little bit differently. Both of them, in my opinion, have said that they are not sure how they would decide that case, and that they wouldn't want to give the opinion that they have now anyway without hearing all the facts and the evidence.

Senator BOB SMITH. Well, I didn't ask about a specific case, Mr. Chairman.

Chairman HATCH. No, but I mean-

Senator BOB SMITH. I asked about their point of view, whether or not life was-

Chairman HATCH. But they both say that that could likely come before them and they are going to have to decide it at that time. And

that is a little different from saying that they would not find that process unconstitutional. And I don't know how they can say much more than that at this point in this meeting.

But I share the distinguished Senator's feelings and I share his point of view that it is a tragedy that we have had this issue go as far as it has in our American way of life. And I just hope that both of you will look at the precedents, and also look at what is right and wrong, if that case ever comes before you.

Senator BOB SMITH. Well, I would just make a final point.

Chairman HATCH. Sure.

Senator BOB SMITH. Mr. Chairman, could I just make a point on that?

I understand what both of the nominees have said here, and as far as judicial activism is concerned, I agree with what Mr. Katzmann said about judicial activism. But what I am saying is if you apply the standard of judicial precedent strictly that you never overturn the law, then you never make a decision, then you would never have overturned-

Chairman HATCH. Nobody is going to-

Senator BOB SMITH. Excuse me. You would never have overturned the

Ferguson case of segregation and you never would have overturned the Dred Scott decision if there had been such a vote before the

Court. And that is my only point and I am just saying that I believe abortion belongs in the same league with those other two

cases. That is my point.

Chairman HATCH. Well, it is a good point, no question.

Let me just say this, that I have seldom seen better qualified nominees for circuit court positions than the two of you. While we may differ on certain philosophical points, the fact of the matter is you are both highly qualified. You both have extensive experience in the law.

There is another vote, so let me just say this. We are honored to have you here. The President has submitted both of you and we

will see what we can do to move your nominations ahead.

And, Mr. Katzmann, I have known you for quite a period of time. I have great regard for you, as well as Ms. Berzon.

In your case, Mr. Katzmann, I am reasonably satisfied as to your qualifications and will do what I can to see that you both have an opportunity to serve on your respective circuits.

I would just ask that when you get there, don't be activist judges; be judges who really abide by the law and set a standard for judges that help us so that it doesn't come down to an issue of liberal or conservative, but it comes down to an issue of understanding the role of judges in our society so that we don't hurt our society.

But in any event, unless you have any further questions, Senator Smith, I think we will release both of you for today. We congratulate your families. I am going to do my best to have all of these

judges who are up today on next week's markup. I can't do it by tomorrow because we do have written questions, and so forth. But by next week's markup, I will try and have you on the-and some of you may be put over for a week, so just understand the process.

Anybody can put any item that appears first on the list over for I week, but then it has to be voted upon at the next markup. So we will move as expeditiously as we can.

Mr. KATZMANN. Thank you very much, Mr. Chairman and Senator Smith.

Chairman HATCH. Thank you both for being willing to serve.

JOHN KELLY
THURSDAY, JUNE 18, 1998
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Jon Kyl, presiding.

Also present: Senators DeWine, Kohl, and Feinstein.

OPENING STATEMENT OF HON. JON KYL, A U.S. SENATOR
FROM THE STATE OF ARIZONA

Senator KYL. The hearing will come to order. Welcome to this hearing of the Senate Judiciary Committee for the purpose of considering nominees to both the district and circuit courts of the United States.

The individuals who will be subject to consideration today are: for the circuit court, this for the eighth circuit court, John D. Kelly, of North Dakota; for the ninth circuit court, Kim McLane Wardlaw, of California; and for the district courts, first of all, from Arizona, Judge Raner Collins; from Louisiana, Robert James; for the Northern District of Ohio, Dan Polster; and for the Middle District of Louisiana, Ralph Tyson.

We will have a member of the minority, probably Senator Kohl, joining us briefly. I know that Senator DeWine is on the panel, so I will recognize Senator DeWine first.

Now, let me first set the procedure here. Given that Members of Congress are here, we will ask them to introduce nominees that they would like to introduce to the committee, and then, of course, the members are free to leave, although I suspect at least Senator DeWine, a member of the committee, might want to stay. Then after that is completed, we will have the circuit court nominees come forward, and they will be questioned and given an opportunity to introduce their families and friends who are here, and then following that, the nominees for the district court.

And I think what I might do is to pass for a moment on the two North Dakota Senators and allow you to introduce your candidate. I will call that candidate to the dais. You can introduce the candidate at that time and actually begin the formal proceedings of our panel one, if that is satisfactory.

What I thought I would do next, since it is customary for the committee to consider the circuit court nominees first as a panel and then the district court nominees, since we have two circuit court nominees and we have the four Senators representing the States of those two nominees, to hold their introductions for right now. And perhaps the way we could do it is this: I will call upon Senator Feinstein and Senator Boxer first to introduce their nominee, and then call upon Senator Conrad and Senator Dorgan to introduce their nominee. When you are called upon, please introduce the members of your family who are here or friends that you would like to introduce, and then come forward to the dais.

Senator Kohl, you have arrived. Do you have any opening statement you would like to make before proceeding with the nominee.

Senator KOHL. No. Thank you, Mr. Chairman.

Senator KYL. OK. Thank you.

Then, in that case, let me turn to our two North Dakota Senators, Senator Conrad and Senator Dorgan. Who would like to proceed?

Senate CONRAD. I will go ahead.

Senator KYL. Senator Conrad.

STATEMENT OF HON. KENT CONRAD, A U.S. SENATOR FROM
THE STATE OF NORTH DAKOTA

Senator CONRAD. Senator Kyl, Mr. Chairman, thank you very much for holding this hearing, and thank you even more for including John Kelly's nomination for the Eighth Circuit Court of Appeals in the hearing order.

John is here and accompanied by his family, and maybe we could introduce them. I would ask John to stand, his wife, who we all know as Tish Kelly, the former Speaker of the North Dakota House of Representatives; their sons, David, Peter, and Dan. I might add that Dan until recently was on my staff here in Washington. Their family members, Genny Matthews, a niece; Matt Greeley, a cousin; and Bill Scouton, who is a friend of the family. In addition, Kim Copeland, who is on Senator Dorgan's staff, is also a friend of the family and is here as well.

Senator KYL. We welcome you all. Thank you all for being here.

Senator CONRAD. Mr. Chairman and members of the committee, John Kelly is one of the most distinguished members of the bar of the State of North Dakota. He is a North Dakota native, graduated from one of the Nation's preeminent law schools. He has had a distinguished career in the law, rising to the presidency of the Vogel

law firm, which is among the most prominent in the State of North Dakota.

John is widely recognized as one of the outstanding practitioners of law in our State. He has a wealth of experience as a counsel for both plaintiffs and defendants. He has practiced in State and tribal courts. He has ably represented clients in Federal courts before the eighth circuit and in the U.S. Supreme Court.

John Kelly has earned the respect of people across the State of North Dakota for his distinguished service. Since the President submitted his nomination, we have had just an outpouring of support. I want to make part of the record this list of letters of people

who have written saying John Kelly is the man for this position.

Let me just hit the highlights of people who have written.

Alan Olson, former Republican Governor of the State of North Dakota, and former attorney general of the State of North Dakota;

Robert Wefald, another former Republican attorney general for the State of North Dakota; Steven Easton, a former Republican U.S.

attorney for North Dakota and a former Republican national committeeman; the majority and minority leaders for both houses of

the North Dakota Legislature; the Republican chairman of the State Senate Judiciary Committee; the Republican president of the State Public Service Commission; and many others from across our State.

Senator KYL. I didn't know you had that many Republicans in North Dakota. Things are looking up.

[Laughter.]

Senator CONRAD. Let me tell you, Mr. Chairman, a lot of Democrats as well.

Senator KYL. I am well aware.

Senator CONRAD. We are very proud of the support that he has received from both sides of the political fence.

Senator KYL. That entire document will be included in the record.

Senator CONRAD. We appreciate that very much.

Mr. Chairman, I would like to close by offering an excerpt of a letter from the former Attorney General of the United States, Richard Thornburgh. Attorney General Thornburgh writes about John Kelly, "I am confident that you will find him to be a man of great integrity and intellect who will well serve the Federal judiciary."

Let me just say I agree wholeheartedly with Attorney General Thornburgh. Our country will benefit from the contributions that John Kelly will make on the Court of Appeals for the Eighth Circuit. I could not be more proud than to offer as North Dakota's choice for the eighth circuit somebody of John Kelly's outstanding reputation, intellect, and integrity.

I thank the Chair and I thank the members of the committee.

Senator KYL. Thank you, Senator Conrad.

Senator Dorgan.

STATEMENT OF HON. BYRON L. DORGAN, A U.S. SENATOR FROM THE STATE OF NORTH DAKOTA

Senator DORGAN. Mr. Chairman, thank you very much. I am one of those Norwegian Lutherans from the Northern Plains, and I must confess that I have difficulty overstating anything. In fact, when we say "he's OK" about someone, that means that he is the very finest there is. So I am here to say John is OK, and he is the very finest there is.

John Kelly is someone who I think will make a wonderful addition to the eighth circuit court. He is someone who has had a

breadth of experience: legal education at one of our country's preeminent law schools, 36 years of experience in trial and appellate

experience, both State and Federal courts, and as Senator Conrad just indicated, he has support from virtually every direction. I have not seen an appointment that we have been involved in making as a delegation or in recommending as a delegation that has received that kind of support from every part of the political spectrum. And that is because John Kelly has worked with so many people on so many things for so long a time and has impressed virtually everyone he has worked with and met.

He will not only bring impeccable credentials, experience, and I think a formidable legal mind to the eighth circuit; he will bring, I think importantly, a judicial temperament and a healthy dose of North Dakota commonsense. And I think you can feel confident he will be a jurist who understands the importance of the rule of law to society and the judiciary's proper role within this constitutional system of ours.

He has this delegation's enthusiastic and complete support, and we urge the committee to report him positively and quickly, and we think that he will contribute well to this country.

I must finally say that in a day and age when there seems to be so much cynicism about public service, am really heartened that people like John Kelly with his experience will step forward and say I am available to serve my country. This country is in good hands with John Kelly.

Senator KYL. Thank you, Senator Dorgan.

We are also joined by Representative Earl Pomeroy.

STATEMENT OF HON. EARL POMEROY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH DAKOTA

Representative POMEROY. Thank you, Mr. Chairman.

The position of being a justice on the Eighth Circuit Court of Appeals is a very significant position within our Nation's judiciary,

and the candidacy of John Kelly for this spot truly does represent one of our State's most accomplished and most esteemed jurist, or members of the legal profession, soon to be jurist, we hope: intellect, integrity, reputation, and experience. I think those four things really capture the background that John Kelly represents and would offer to this position.

I used to practice law in the town of Valley City, my hometown, 60 miles from Fargo. Even at that time, several years ago, John was one of the most highly regarded members of the legal profession in North Dakota. Later I went on to serve as the State's insurance commissioner in a widely different capacity. I again had a chance to observe the significant legal talent of John Kelly.

I really do think that what we look for in the judiciary--intellect, integrity, experience, and reputation--based upon the other three, John Kelly is--we couldn't do better for the Nation's judiciary than advancing John Kelly. And I urge your speedy confirmation.

Thank you.

Senator KYL. Thank you very much, Representative Pomeroy. We appreciate your presence here.

Now, if I could ask John D. Kelly, of North Dakota, and Kim McLane Wardlaw, of California, to come forward, please. Before you are seated, could I ask you to take the oath with me?

Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KELLY. I do.

Senator KYL. Thank you very much.

Well, you have been well introduced, as you have heard, but I would afford you at this time the opportunity to make any opening remarks that both of you would like to make.

John Kelly, would you like to make any opening remarks, please?

TESTIMONY OF JOHN D. KELLY, OF NORTH DAKOTA, TO BE
U.S. CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT

Mr. KELLY. I do not have an opening statement. I just want to point out to the committee that my youngest son, Daniel, is here.

He just started law school at the University of Iowa, and I want to assure everybody that he did it on the merits. It was not an effort to influence Senator Grassley at all.

[Laughter.]

Senator KYL. Well, thanks very much. We had a little meeting this morning of the Judiciary Committee. I indicated that we would be holding this hearing this afternoon. We had a little discussion about filling judicial vacancies, and I made the comment that we had a great panel this afternoon that we should be able to move quickly through the committee if all goes well. And I hope that with that announcement that all of you who might be perhaps a little bit concerned about the committee's intentions can rest at ease.

Obviously, people may have questions, and we may want to go into matters, but the fact of the matter is this is a terrific panel, in both the district and circuit court nominees.

I would like the people in the audience to know at the outset that from now on it may appear to be a bit perfunctory because the

questions that we will ask are not long and involved and get into a lot of history of the background of the nominees. There is a little bit about judicial philosophy, adherence to precedent, things of that sort that we want to ensure is on the record. But you should not take from the fact that all of the committee is not present or that we don't take 6 or 8 hours in this hearing as an indication that there is a lack of interest or a lack of concern in obtaining the quick confirmation of these nominees. Rather, the fact that the hearing is done relatively quickly, without a great deal of time or involvement, should be a suggestion that these nominees have performed so well in their background and that enough people have

already looked at their background to assure many of us that the confirmation process should go fairly quickly and fairly well.

So we hope that that is the case, and, again, I don't want you to take from the speed with which we do this any suggestion that the members of the committee do not care to go into more detail.

Now, with that, let me ask a couple of questions of our two nominees, and then I will turn first to Senator Kohl and then to Senator

DeWine for questions that they may have. And I will rotate. Since I am going to ask both of you the same questions, perhaps, Mr.

Kelly, I will ask you the first question.

Are you committed to following Supreme Court precedent and the rulings of the Federal Circuit Court of Appeals or our circuit faithfully and giving them full force and effect even if you might personally disagree with the precedent or the rulings?

Mr. KELLY. Yes, I would do that.

Senator KYL. What would you do if you believed that the Supreme Court or perhaps previously your circuit had seriously erred in rendering a decision? Would you nevertheless apply that decision? Or would you apply your own best judgment of the merits? Take, for example, the Supreme Court's recent decision in the *City of Boerne v. Flores* case where the Court struck down the Religious Freedom Restoration Act. A pretty difficult question, I might add.

Mr. Kelly.

Mr. KELLY. I would apply the law regardless of whether or not I as a personal matter had some problem with it.

Senator KYL. Thank you. And, finally, Mr. Kelly, under what circumstances do you believe it appropriate to declare a law of Congress unconstitutional?

Mr. KELLY. I think that the presumption is that the law is constitutional, and if the precedents of the Supreme Court and the

body of law that would be available mandated a determination that a particular law be ruled unconstitutional, I would do it. But I think clearly as a starting point, I would proceed on the basis that the law is constitutional and that it is within the power of Congress to adopt the law.

Senator KYL. Thank you.

Thank you. I may have some more questions later.

Senator Kohl.

QUESTIONING BY SENATOR KOHL

Senator KOHL. Thank you very much, Senator Kyl.

Mr. Kelly and Ms. Wardlaw, in the past few years, there has been a growth in the use of so-called protective orders in product liability cases. Critics of this trend believe that these orders sometimes prevent the public from learning about health and safety hazards. The issue has been debated repeatedly by the Judicial Conference.

Let me ask you this question. Should a judge balance the public's right to know against the litigant's right to privacy when the information sought to be sealed could keep secret a public hazard?

Mr. KELLY. I think that the-and I assume that this is something that the district judge would be confronted with.

There are,

I think, some standards and rules that apply to when it is appropriate to seal a record or to permit a matter to be-remain confidential. And I think that is an exercise of discretion.

If we are talking about a situation where the lawyers, the officers of the court, are engaged in some kind of an effort to keep the

public in the dark, I would think an appropriate exercise of discretion would be to not approve it. But I know there are many reasons

why some records are sealed and that may-and that are legitimate, I think. I have not, of course, had any experience in sealing

records, and to my knowledge, I have never been involved in a case-and I have been involved in many cases in State and Federal Court-where all settlement records were-remained sealed.

Senator KOHL. All right. Folks, could you cite two Supreme Court cases in this century that you believe to be the most significant?

Mr. KELLY. The most significant case, I think one of them is the school desegregation case, *Brown v. Topeka*. And I think another case that was significant certainly was the decision of the U.S. Supreme Court that permitted Japanese Americans to be kept in basically concentration camp-like circumstances. It was a significant decision, and we are still living with the repercussions.

Senator KOHL. All right. Let me ask you this hypothetical question: Say you were called upon to review a case involving a school

voucher program which allowed a city to spend taxpayer money to send students to parochial or other religious schools. Without saying which way you might decide the case, please describe the methodology you would apply and the factors you would consider most important in reaching your decision.

Mr. KELLY. I think from my standpoint, and being at least aware from the press reports of the Wisconsin case involving, I think, the Milwaukee School District, that is something that I think will get to the Supreme Court, and obviously in making an analysis of whether a voucher system passes constitutional muster, the Supreme Court is, I think, ultimately going to make that determination, and I would expect that they would not leave it up to the circuits to determine that kind of an issue. I think there will be a definitive answer, and it will be provided by the Supreme Court.

In the absence of such a binding precedent, I would look at the Supreme Court cases for primary guidance in terms of determining whether that kind of a program violates the Constitution of the United States.

Senator KOHL. All right.

Mr. KELLY. And I would proceed on the basis, the assumption that it doesn't, until I was satisfied that it did. But I don't think that that is the kind of decision that I would be called on to make other than to implement Supreme Court-

Senator KOHL. OK.

Thank you, Mr. Chairman.

Senator KYL. Senator DeWine.

QUESTIONING BY SENATOR DEWINE

Senator DEWINE. Thank you, Mr. Chairman.

Senator KYL. Thank you. If I may ask both of you just one other question, do either of you have any legal or moral beliefs which would inhibit you or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as

a Federal judge?

Mr. KELLY. I have none. It is constitutional. As long as it met the standards that the Supreme Court has set, I would follow the law and proceed accordingly?

Senator KYL. All right. Let me ask you just one more question. The general subject here is affirmative action or preferences.

Mr. Kelly, would you state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness under the equal protection clause of the 14th amendment and

the Federal civil rights laws of the use of race-, gender-, or national origin-based preferences in such areas as employment decisions--hiring, firing, promotions and so on--college admissions and scholarship awards, and the awarding of governmental contracts? What is your understanding of the lawfulness under the equal protection clause of the use of race and gender and national origin for those purposes?

Mr. KELLY. I think that it has to be strictly scrutinized, and I would apply the law that the Supreme Court has developed in the area. I am not in a position to evaluate a particular program and say this would pass or that wouldn't. That wouldn't be appropriate at all for me to do. I don't as a judge intend to tell people how I am going to rule before the hearing starts, before I have read the briefs or anything. So I think under the circumstances a judge in the court of appeals has guidance and direction from the U.S. Supreme Court, and I would use that as a basis for evaluating affirmative action programs. If they didn't pass muster, they didn't pass muster.

Senator KYL. Thank you.

Well, let me thank both of you for being here, for your cooperation. If there is anything further that you wish to submit to the

committee, I don't think we have a time limit for doing that. Please feel free to do that, and, of course, the committee will correspond with you with respect to further proceeding on your nominations. Thank you very much, and congratulations.

Mr. KELLY. Of course, that goes for Senator Conrad-

Senator KYL. All three of your representatives.

Mr. KELLY. (continuing) Senator Dorgan and Representative Pomeroy.

Senator KYL. You bet. Thank you, Mr. Kelly.

Mr. KELLY. I appreciate the opportunity to come and present myself to the committee.

Senator KYL. You are very welcome. Thank you very much.

ROBERT KING

WEDNESDAY, SEPTEMBER 9, 1998

U.S. SENATE,

COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The committee met, pursuant to notice, at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond, presiding.

Also present: Senators Sessions, Feinstein, and Durbin.

OPENING STATEMENT OF HON. STROM THURMOND A U.S.

SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. The committee will come to order. I wish to

welcome all of you to this hearing of the Senate Judiciary Committee. We are here to consider judicial nominees for the circuit court

of appeals and the district court. It is a pleasure to have distinguished members of the Senate present to introduce particular

nominees, and I am pleased that the nominees were able to be here today.

Hearings on judicial nominees are one of the most important responsibilities of this committee. A Federal judgeship is not only a

position of great power and status, it is also one of greatest responsibility to the people of this Nation and to the Constitution.

I wish to proceed in the following manner: After I call on the

ranking member for any opening statement, I would like for the

members who are present to speak in support of particular nominees. Senators will constitute the first panel. Then we will consider

the judicial nominees in the second and third panels. In the second

panel will be the two circuit nominees, Judge William Traxler of

South Carolina and Robert King of West Virginia, for the Fourth

Circuit Court of Appeals. The third panel will consist of the district

court nominees.

Before we start questioning the judges, I will call on them to

make any opening statement that they wish to make and introduce

any friends or family who are attending with them today.

I don't believe we have a ranking member here. If he comes in,

just send him on up.

Thank you very much.

Senator Byrd.

STATEMENT OF HON. ROBERT C. BYRD, A U.S. SENATOR FROM

THE STATE OF WEST VIRGINIA

Senator BYRD. Thank you, Mr. Chairman. It is a great privilege

to be here today, especially to sit before the distinguished senior

Senator from South Carolina, who is chairman of the Armed Services Committee on which I serve, and also to be here

when his junior colleague, Senator Hollings, who sits on my Appropriations

Committee, has testified on behalf of a nominee.

I was a member of this committee about 30 years ago during the

time when-during a similar time to this when there was great

turbulence in the country. And Jim Eastland was chairman of the

committee, and I was just a lowly member, the bottom of the totem

pole. But we did things a little differently in those days. Instead

of having the 5-minute rule, I can remember interrogating L. Patrick Gray for almost 2 hours in one sitting of the committee. We

had to wait a while before we were recognized, but once we were

recognized, we weren't limited to 5 minutes.

I went off this committee-I first went on it when I received my law degree. I went to school 10 years to receive that law degree, graduated from American University. In those days, as I recall, members of the Judiciary Committee had to possess a law degree or had to have served as an attorney or some such, but I didn't have any of that. But after I received my law degree, then I got off the Armed Services, which I was on that time, and came to this committee.

I went on that committee when Lyndon Johnson, who sat on the Armed Services Committee, was nominated for Vice President, and I took his place, if I may say so.

I thank you, Mr. Chairman. You are fair and you are a man of great experience and highly respected in the Senate, and by all who know you. I am proud to appear here today with my colleague, Senator Rockefeller. I was on the Rules Committee, I believe it was, when we interrogated Nelson Rockefeller to be Vice President of the United States. And I have had the great privilege of serving with Jay for these several years. He was Governor of our State, West Virginia, and I knew him well and favorably then.

We are here today to present an outstanding candidate for a Federal appellate judgeship, Mr. Chairman, and we are going to do so

proudly. I am very honored to have been given the opportunity to be here this afternoon to introduce, along with my colleague-not everybody can say they have served as a colleague with a Rockefeller. Not everybody can say they bought a Rockefeller hamburger.

I have done that. Jay came up the hard way, too, you know.

[Laughter.]

But it is our privilege to introduce to the committee an outstanding individual whom you will consider, the nomination of Robert B.

King to fill the vacancy on the U.S. Court of Appeals for the Fourth Circuit that is being created by the move to senior status of Judge Kenneth K. Hall, whom I urged President Nixon to appoint, as a Democrat. Judge K.K. Hall was a Democrat, but President Nixon was a President who knew how to play politics, and he listened to my importunities that he make this nomination, and he did so. And Judge Hall has made an outstanding record. And I would like to publicly thank Judge Hall for his many years of dedicated service to the Nation. His move to senior status is well deserved, and I wish him all the best as he continues his work, albeit in a somewhat limited capacity, in the fourth circuit.

Mr. Chairman, I have known Robert King for many years. I can say without hesitation that I believe him to be uncommonly qualified to serve on the bench of the U.S. court of appeals. He is a lifelong West Virginia resident. He has spent more than 30 years of his professional life in service to his State and to the Nation.

After graduating from West Virginia University, Bob King worked as a teacher, as you did, Mr. Chairman, at one time in your life, as a teacher. He was a teacher in the Greenbrier County schools of West Virginia before returning to law school. I doubt that he studied Blackstone like you did, Mr. Chairman, but he is equally a good lawyer.

Once armed with his doctor of jurisprudence, Robert King went on to practice law in Lewisburg, WV. That is where the great Greenbrier is located. Anyone in this room or within the sound of my voice who has never been to the Greenbrier, you ought to go,

make it a point to go, because there is nothing like it.

In 1970, Mr. King was appointed to serve as an assistant U.S. attorney for the Southern District of West Virginia during the Nixon and Ford administrations. And in 1977, Robert King was appointed by President Carter to the position of U.S. attorney, an appointment which has extended into the Reagan administration. So he has been over these grounds before. He is not a new boy on the street.

Of course, his appointment to the position of U.S. attorney means that he has, as I say, already appeared before this committee.

For the past 17 years, this nominee has had what by any account would be considered a distinguished legal career, as a founding partner in the Charleston firm of King, Allen and Guthrie. And it is this long service that equips Robert King with the requisite education and experience to serve as a Federal judge, but beyond this

valuable experience, he also possesses the kind of deep-seated integrity, strong work ethic, and love of public service that appeal to

you, Mr. Chairman, and that combines to make an outstanding member of the judiciary.

In short, Robert King is a fine and deserving addition to the appellate court, and I trust that this committee will reach the same conclusion.

I would like to join with my colleague at this moment in noting the presence this afternoon of the devoted, talented, and gracious wife of the nominee, Julia King, and several other members of his family, children, in-laws, and one grandchild, I believe. So if they would hold up their hands so that the chairman might see them?

Thank you.

Julia is like my wife. She has supported her husband and managed for some 33 years all the while undertaking the difficult but

rewarding task of raising four children.

I thank the committee for allowing me to appear this afternoon, and I thank my colleague for joining with me, for serving with me, for working for the people of West Virginia.

I close by saying that Alexander the Great, when he listened to a prosecutor bring an indictment, he, Alexander the Great, would put one hand over one ear and keep that ear closed. He kept that ear closed for the defendant. He was fair and just. He wanted to listen to both sides and give both sides equally an opportunity to have his attention. I believe that Bob King will be the same, Mr. Chairman, be like Alexander. I am sure he will do us all a great honor and serve with great distinction.

Now, Mr. Chairman, I close my remarks. I know that my colleague will also want to present his words on behalf of Mr. King.

Senator THURMOND. Senator Byrd, I have been in the Senate for 44 years. I believe I am the senior Senator. I had the pleasure of serving with many people, and I consider you one of the ablest, most distinguished Senators with whom I have served, and I feel honored to have you here today.

Senator Rockefeller.

Senator BYRD. If my colleague will allow me just to make a comment, I thank you, Mr. Chairman, for that comment, which I will

not forget. I am grateful to the benign Creator of us all that I have had the opportunity to serve in the U.S. Senate-not as long as you have, but for near 40 years, and on the Hill in Congress for 46

years. And I treasure what you have said, but I treasure even more than that the privilege of having served with you through many of the great events of this Republic.

Thank you, Mr. Chairman.

Senator THURMOND. Senator Rockefeller.

STATEMENT OF HON. JOHN D. ROCKEFELLER IV, A U.S. SENATOR FROM THE STATE OF WEST VIRGINIA

Senator ROCKEFELLER. Thank you, Mr. Chairman. I frankly am very moved by the comments that the chairman has made about my senior colleague, Senator Byrd, comments that would be heartily agreed with in the State that he and I represent by its people

and by all who have come to know Senator Byrd via contact with him directly, through his office, or listening to him or watching him on television and in other ways, which leads me what I want to say about Robert Bruce King, Bob King.

There is, I think, abroad in the land these days a sense that the body politic is somehow suffering because people are more interested in making money or in turning to pursuits which are less arduous, which require less of the obsessive commitment, the quest for truth and policy and judgment that is the goal of all of us, but not achieved by every single one.

I have a very different view, and that is that the times may be turbulent in our country, and it may be less fashionable now for young people to be thin king of the ages of 11 or 12 or 13 or 15 or 16 that they hope someday to have a career in public service or in politics.

I don't, however, believe that the quality has done anything but improve. I think people today who select public service do so with a very clear eye and with the full knowledge that they have many other opportunities that are before them, particularly if they have the talent to be, for example, appointed to be a Federal judge, the chance to be approved to be a Federal judge, approved by the President, approved by the Congress. It is a very high and lofty possibility.

Bob King is one of those people that makes me proud to be in public service because I think we are in public service for the same reason, and I think Senator Byrd would agree with what I am about to say.

Public service is not simply being elected to an office. Public service can be teaching. Public service can be being a public health nurse, being a social worker, and being, in fact, a Federal judge.

Being a Federal judge is a very hard thing to become.

This is a committee in which I have sat a number of times, and I have always been awed by the quality of the people who come before this committee seeking approval to be in the position of Federal judge.

I think that my colleague, Senator Byrd, would agree with me when I would say that if one is to succeed in public service or in private life or in any worthy purpose, one has to have a moral compass and that there are a number of decisions in our lives that are

relatively easy, but there are many which are not. And when you come to those points that you have to make very tough decisions, you have to reach down and look at something called your moral compass. And it is felt, it is developed, it is perceived, it is God-given. And if you are a good person, you trust it. And if you are

a good person, it guides you in the right way.

Bob King has that moral compass, and if I had to say one thing

about him, it would be that.

In West Virginia, it is interesting that people often talk about the work ethic of our people, Mr. Chairman. That is not to boast about West Virginia, to say West Virginians are better or harder-working than any other people, but it somehow works out that people talk a lot about our work ethic. And maybe that is because we are a State that has had to fight hard all of our life to succeed even a little bit. Over the last 4 decades, our State, West Virginia, has lost population. And every time there was a census, we would lose another Congressman and we would lose more population. Now we are gaining. We are only gaining a thousand people a year, but we are just as proud of that as the State of Nevada would be for gaining a thousand people every 5 minutes.

But Bob King simply works hard. He is incredibly fair. He is humble, with really very little to be humble about. He is that kind of quintessential family person who is idealized, but then you realize that those folks do exist and those families do exist and they have that kind of closeness and that kind of bond.

I am not a lawyer, Mr. Chairman, and I can't make pronouncements on legal opinions and would not attempt to do so. But I

know through a very close association with Bob King over many years that he is one of my proud moments in a relatively short span of time in the U.S. Senate, only 13 years. I have been proud to serve with Senator Byrd during each and every hour of those 13 years, but never prouder than to sit before you, the most senior distinguished member of the U.S. Senate, and present my endorsement without qualification, with strong personal feelings and strong professional feelings, insofar as I am not a lawyer, but a person with a pretty good judge of people, to present to you Bob King. It is one of the honors of my lifetime, sir, and I am proud to do that.

Senator THURMOND. Senator Rockefeller, we are glad to have you with us. You come from one of the greatest families in America. It is an honor to have you here.

Senator ROCKEFELLER. Thank you, sir.

Senator THURMOND. I would ask all the nominees to come forward and have seats up here--oh, just Judge Traxler and Mr. King at this time.

I will now administer the oath to Mr. King and Judge Traxler. Please raise your right hand. Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KING. I do.

Senator THURMOND. If you have opening statements, we will start with Mr. King. We would be glad to hear from you, Mr. King.

TESTIMONY OF ROBERT B. KING, OF WEST VIRGINIA. TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT

Mr. KING. Mr. Chairman, I have no opening statement. I want to express my appreciation to the committee for the opportunity to be here, and certainly also my appreciation to Senator Byrd and Senator Rockefeller for their support in connection with this nomination and for their kind remark.

I would mention that I have with me today my fine family: my wife, Julia, as well as my four children, Emily Schaefer and her husband, Dixon Schaefer, and their little daughter, Baby Jane; my daughter, Caroline Grubbs, and my son-in-law, Rob Grubbs, along with my two twin sons, Bruce and Bill King, and my sister, Mary Ellen Mazie of Ohio, and I am proud also to have my niece, Mr.

Chairman, Roberta King, who is a law student at Wake Forest University. She is here today and particularly representing my brother, who passed away a couple of years ago, who was an attorney in Greenbrier County

Senator THURMOND. Would you like for all of your friends and members of your family who are here raise your hands? Thank you.

Mr. KING. Thank you, Mr. Chairman.

Senator THURMOND. Mr. King, I understand that your legal practice consists of a considerable amount of criminal defense work.

Can you assure us that, if confirmed, you could transfer from your current advocacy role to being an objective judge and weigh the rights of defendants, the government, and victims?

Mr. KING. I certainly can provide that assurance, and I do provide that assurance, Mr. Chairman.

Senator THURMOND. Mr. King and Judge Traxler, what role do you believe judges have in developing public policy through case law when the legislature repeatedly fails to address important matters?

Mr. KING. Mr. Chairman, I do not see a role for the judiciary in the development of public policy in that manner.

Senator THURMOND. Do either of you have any personal objections to the death penalty that would cause you to be reluctant to

impose or oppose a death sentence?

Mr. KING. Mr. Chairman, I do not.

Senator THURMOND. Do either of you have any objections to mandatory minimum criminal sentences that would cause you to be reluctant to impose or oppose such a sentence?

Mr. KING. I do not, Mr. Chairman.

Senator THURMOND. As both of you know, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the guidelines do not

provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

Mr. KING. Mr. Chairman, I served as a Federal prosecutor in the 1970's and into the 1980's for almost 9 years, both as an assistant U.S. attorney and as the U.S. attorney. We had in our district in West Virginia-unfortunately, at that time, we had judges who were stricter than others, and we had situations where defendants with similar offenses received disparate treatment as a result of the roll of the dice or the case assignment in many situations.

I think that is the kind of situation that gave rise to the need for the sentencing guidelines, and I understand that and I support that.

Senator THURMOND. Senator Sessions, do you have any questions?

Senator SESSIONS. Senator Durbin may be prepared next, and I am-

Senator DURBIN. Thank you very much.

Senator THURMOND. I will call on you in just a minute.

I called on you now.

QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. All right. Very good.

Mr. King, you and Judge Traxler will be taking on a tough job in the fourth circuit. I believe, from the testimony we had with

Judge Harvey Wilkerson, Senator Thurmond, that the fourth is the

busiest circuit; if not the busiest the second busiest circuit in America. And they take great pride in the quality and volume of work

they turn out: I would ask you for your commitments. Do you recognize that this is more than a retirement job, it is a very tough

job, and are you prepared to give it your best professional effort?

Mr. KING. Senator Sessions, I recognize that it is a very substantial challenge. I look forward to it, and I will give it my every effort.

Senator SESSIONS. Judge King, you will have them come and say it is just unfair, the application of this guideline is just unfair. But you ask, by what standard? At least there is some objective standards on the guidelines, and leaving it without any standards, which is basically what we had before, I think is the greater evil.

With regard to the question that Senator Thurmond asked about the failure of the legislature to act, I have observed in Alabama and other places people say, well, the Federal courts had to act, the legislature wouldn't. And I think what Senator Thurmond suggested was that the decision not to act by a legislature is a decision also.

Would you comment on that tension or that problem of courts that sometimes think they have to act when the legislature, didn't do something they thought ought to be done?

Mr. KING. Senator Sessions, I take a very traditional view of the separation of powers and particularly the powers of the judiciary.

I recognize the limited role of the judiciary, and I recognize the deference that should be given to the other branches of government.

And I would not be-and I do not espouse any form of judicial activism.

Senator SESSIONS. Well, I appreciate that because a decision by the legislature not to pass a law is a decision as well as it is to pass one.

You have also represented a number of plaintiffs in personal injury cases, and I have done that and represented defendants as

well. There is nothing wrong with that. But let me ask you, do you believe it is appropriate for a trial judge to reduce a verdict if that verdict is found to be excessive?

Mr. KING. In the exceptional circumstances where it may be excessive, there are those circumstances. I have never had experience

with it. I have been involved in the representation of plaintiffs in personal injury cases. I have represented a lot of defendants in personal injury cases.

Senator SESSIONS. I am sure you didn't think any of those verdicts were excessive that you obtained. But sitting on the other

side of the bench, are you prepared to evaluate that fairly, forgetting your prior involvement as a plaintiff attorney?

Mr. KING. Oh, absolutely.

Senator SESSIONS. And be prepared to reduce a verdict that you think is excessive?

Mr. KING. I certainly will do what is appropriate, Senator Sessions, absolutely.

Senator SESSIONS. Have you expressed any opinions in any forums in which you have suggested it is improper or that judges

ought not to exercise powers to reduce verdicts?

Mr. KING. No, I have not.

Senator SESSIONS. Well, I thank you very much for being here. You are undertaking a very important position, the court of appeals, one step from the U.S. Supreme Court. You will be setting law for a number of States and will be involved with a large number of very important cases.

We hope that you will be successful in this process, and you have received good support from your Senators, and we appreciate that.

Thank you, Senator Thurmond.

Senator THURMOND. Thank you.

Senator Durbin.

QUESTIONING BY SENATOR DURBIN

Senator DURBIN. Thank you, Mr. Chairman.

Mr. King, you have had a very active practice but for the years

when you served as a prosecutor, and I was curious. I have never

asked anyone seeking this position before this question, but I wanted to ask it of you, and perhaps you know the answer and maybe

you do not. What are the standards that are used in terms of conflicts of cases that might come before you? Are there standards that

are clearly articulated as to the types of cases where you would be expected to recuse yourself?

Mr. KING. Well, there are--the rules of--the code of judicial responsibility--the Code of Judicial Ethics, I believe is its formal

name--had standards for recusal, and there are also statutory

standards for Federal judges, section 455 of title 28. I have not

been a judge before. I will assure you that I will act appropriately

with respect to any issues of those kinds.

Senator DURBIN. I don't want to suggest that you would not. This

is an inquiry. I am going to ask in one particular case, and perhaps

you would have to check and determine whether or not it would be

appropriate for you to consider such litigation. But I noticed in

your background that you have represented an American tobacco

company in a case involving whether or not the attorney general

of your State had jurisdiction to bring a lawsuit against--I guess

on behalf of the people of West Virginia against that tobacco company, a common law action.

Can you tell me, since we are now involved in some 42 different

States with actions against tobacco companies, would you then consider it appropriate for yourself to be recused from cases involving

tobacco companies if you were, in fact, confirmed?

Mr. KING. Senator Durbin, I represented Philip Morris in that

particular case, the Medicaid case pending in West Virginia, which

is now pending in the Supreme Court of Appeals of West Virginia,

and I have represented Philip Morris in some other litigation also

in West Virginia, the tobacco-type litigation.

I believe my--my view is at this point that I should not sit with

respect to any tobacco litigation that might come before the Fourth

Circuit Court of Appeals. I would feel uncomfortable doing so.

Senator DURBIN. Well, I thank you for that answer. Please understand that I am not raising that on your account

personally because I believed otherwise. I was curious. I have never asked that

question of a practicing attorney, and I am sure this would present

itself in many different guises. But this is an issue that, as you can

imagine, we have focused on a lot on Capitol Hill, and it is likely

that it will continue to percolate through the courts at all different

levels from time to time.

I would like to ask a follow-up question to Senators Thurmond and Sessions on sentencing guidelines. As a prosecutor and as a former--or as a Judge and prosecutor, I would like

to ask you, have you had cases where you felt the sentencing guidelines were unfair in light of the circumstances,

where, in fact, if

you had looked at the individual defendant you would say the

range of sentencing guidelines given to us by the Federal Government, the Congress in this case, really don't take into consideration

some factors which they should, and perhaps are too harsh in

terms of the options offered to the prosecutor and to the judge?

Have either of you run into those circumstances?

Mr. KING. Senator Durbin, from my experience, I have not, but when I was the prosecutor, we didn't have the sentencing guidelines. I was a prosecutor-I was a U.S. attorney in the Carter administration and an assistant U.S. attorney in the Nixon administration in the early 1970's. Since the sentencing guidelines came into effect in 1987, my experience has been on the other side of the fence, and it has been quite limited. But I have not had experience where I thought the guidelines were too harsh, no.

Senator DURBIN. Thank you for your testimony. Thanks for being here today.

Senator THURMOND. Well, that completes the hearing on you, gentlemen. I wish you well, and I feel certain that the Senate will confirm you. And you are now dismissed.

Mr. KING. Thank you, Mr. Chairman.

RICHARD LINN
THURSDAY, OCTOBER 7, 1999
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:28 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Thurmond, Leahy, Abraham, and Kennedy.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. I apologize for starting this late, but we do have to vote around here sometimes, and they always come at the most inconvenient times for the Judiciary Committee, it seems like, and maybe some others as well.

But today the committee is holding its fifth judicial nominations hearing for the year.

Now, today's hearing also specifically involves four judicial nominees--one nominee to the Court of Appeals for the Federal Circuit,

and three district court nominees--as well as seven nominees to be members of the U.S. Sentencing Commission.

We shall have three panels. The first panel will consist of the nominees' sponsors who will give brief statements on behalf of their nominees. The second panel will consist of the judicial nominees. And the third panel will consist of the seven nominees to the U.S. Sentencing Commission.

Now, as soon as the ranking member gets here we will accord him the privilege of making any statement he would care to make, and I think because of the vote we are late in having the sponsors of these nominees here to speak for and on behalf of the judicial nominees.

Senator LEAHY. Mr. Chairman, I should also note when I give mine regarding Mr. Linn that Senator Warner also said he had hoped to have been here with him, but could not because he is testifying on the comprehensive test ban treaty.

Chairman HATCH. He is really very busy today, and we will put his statement in the record in both cases.

Well, if I can ask the four judgeship nominees--Richard Linn, Ronald A. Guzman, William J. Haynes, Jr., and Barbara M. Lynn--to take their seats at the table, we would appreciate that.

If you would all just stand, I will swear you in. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. LINN. I do.

Chairman HATCH. Thank you very much.

I am going to turn to the ranking member for a statement that he would like to make at this time, and then we will proceed with the hearing.

Senator LEAHY. Thank you very much, Mr. Chairman, and later I will also give another statement at the appropriate time, an opening statement on the Sentencing Commission. But I do not want

to hold--I was going to be here, anyway, so I do not want to hold up my other colleagues from the House and the Senate who were making introductions and who would be leaving.

I am extremely proud that the President has sent all of these

nominees, but I hope that three of you will not feel at all badly if I mention first Richard Linn.

I have known Richard Linn for well over a decade. I know him to be a man of great integrity and competence and ability. A son of immigrants, a man who worked his way through college and law school, is married to a wonderful woman, Patricia Linn, has two great daughters whom he will introduce, two wonderful sons-in-law, a new grandchild and other grandchildren. It makes me jealous he has more than I do, Mr. Chairman, but not as many as you do, but then nobody does.

[Laughter.]

A matter the chairman reminds me of with some frequency-with great pride, I might say.

As you see in his background, his is a law career of experience and accomplishment both as a trial attorney, as a partner in significant law firms, and including today, as one of the leading voices

in intellectual property law, one who has argued some of the most significant cases there and written extensively in those areas. All of these things demonstrate a person whose qualities for the Federal Circuit Court of Appeals are so good that anybody, any President, should be glad to see him there, any Senate should be proud to confirm him.

But I can speak as a friend to another factor that will not probably show up in the background checks and all the rest, and that

is his sense of integrity, his sense of fairness, his sense of honesty that I have not seen equaled anywhere. He is a man who is also, unlike those who spend their time solely within the confines of the bar and its emoluments, and its return. He has worked so hard outside it, and I would mention one area especially. He has been a leading voice not only in this area but in this country in the fight against juvenile diabetes.

Mr. Chairman, I have seen him go from personal interest and family interest, but something where he has reached out to help families throughout this country. And someday when a cure is found for juvenile diabetes, Richard Linn will be on that stellar list of those who helped bring it about.

So I am glad he is here, Mr. Chairman. I don't want to holdup the committee, but I will put my full statement in the record. But I did want you to know that.

Also, I would emphasize again, as I said earlier, Senator Warner intended to be here for his introduction too, but is testifying in his capacity as Chairman of the Armed Services Committee over in the Foreign Relations Committee.

Chairman HATCH. Well, thank you, Senator.

We welcome all of you to the committee. I have to leave, so Senator Thurmond is going to chair until Senator Abraham gets here.

We are proud to have you here before the committee, and we look forward to moving your nominations as quickly as we can. So, with that, why don't we start with you, Mr. Linn? And maybe you would want to introduce your family members that are here. Each of you can make whatever statement you would care to make, and then introduce your family and friends, whoever you would care to introduce, and we will go from there. But if you will forgive me, I am

going to have to leave.

Thanks, Senator Thurmond.

TESTIMONY OF RICHARD LINN, OF VIRGINIA, TO BE
U.S. CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

Mr. LINN. Thank you, Mr. Chairman, and thank you very much, Senator Leahy, for those warm remarks.

It is a pleasure for me to be here, and I thank the committee for inviting me today. I would like to introduce to the committee first my wife of 33 years, Patricia Linn. And I also have with me today-

Senator THURMOND. [presiding] Still with you, eh?

Senator LEAHY. She is still with him.

Mr. LINN. Still with me.

Senator LEAHY. I can certify to the Chair that that is true. I have seen them together.

[Laughter.]

Mr. LINN. The first and my only wife.

I am also proud to have my daughter Debbie with me, Debbie Linn and her husband, Jonah Linn, and that is correct. It is Linn. Jonah had the wisdom and foresight when he married my daughter 2 years ago, in consideration of the fact that I only have daughters, I only have one sister and no brother, that he decided on his initiative to adopt my name to carry on the family name. I am very, very grateful and proud of that.

I also have another daughter, Sandra Arneson, who could not be here with us today-she is a photo editor in Charlotte with the Charlotte Observer-and a wonderful son-in-law, Erik Arneson; three wonderful grandchildren, Eileen, Kyle, and Jaret; and one more on the way.

My mother, Enid Linn, also would have liked to be here today with my sister, Gail. Unfortunately, my mother has been having some health problems, and my sister is very kind in attending to her in New York.

Thank you, Mr. Chairman.

Senator THURMOND. Mr. Linn, in our tripartite system of government, the Congress under the Constitution makes the law. The

President as the Chief Executive enforces the law. The judiciary interprets the law. Some judges seem to think they have the authority to make law. What is your opinion of my interpretation of our Federal system of government?

Mr. LINN. Mr. Chairman, I think that it is very important for judges to be deferential to the decisions of the Supreme Court, which represent the law of the land, and to interpret the law and to provide clear, succinct precedent to provide guidance to practitioners and citizens. And I don't think it is the prerogative of a court to make law but to interpret the law.

Senator LEAHY. Thank you, Mr. Chairman.

Let me ask Mr. Linn: Let's assume that you are confirmed as a circuit court judge, as I hope you will be. At some point in your career, you may have to apply a Supreme Court precedent that you don't particularly agree with, but it is the standing Supreme Court precedent. Would you feel yourself bound as a circuit court judge to that precedent?

Mr. LINN. Yes, Senator. I clearly would be bound by that. The Supreme Court decision represents the law of the land. I would look very carefully at the facts, and I would look very carefully and consider the facts of the matter before me. But if, in fact, the law applied to those facts, I would clearly apply it.

Senator LEAHY. I find that especially in a little State like mine,

the State of Vermont, we have been extremely fortunate that so many have taken on pro bono work. And I should also note for the record, for those who can't see from back there, Lynn on this side of the table is spelled L-y-n-n; Linn on this side of the table is spelled L-i-n-n.

Ms. LYNN. I regret that, Senator, because in light of your remarks I wanted to claim Richard Linn as my relative.
[Laughter.]

Senator LEAHY. Well, he was president of the Juvenile Diabetes Association-I am probably using the wrong term-now president emeritus, and I just-and Senator Thurmond has heard me say this many times. I have been very pleased when we have lawyers who have been involved in such outside activities, and Senator Thurmond has also told lawyer after lawyer: Remember, if you are confirmed to the bench, remember you don't become God. Remember your days when you had to appear in court and treat people fairly. Thank you.

Thank you, Mr. Chairman.

Senator THURMOND. Thank you, Senator Leahy.

Senator LEAHY. Thank you, Messrs. Revolving Chairmen here.

Senator THURMOND. You want to take it over for the next panel.

Senator ABRAHAM. [presiding] Thank you.

Senator LEAHY. Also, I do have statements, I might say, from Senator Warner, Senator Schumer, Senator Kennedy, and others, and I would just ask, Mr. Chairman, unanimous consent that, the close of business today, any appropriate statements of any Senator of either side be admitted.

Senator ABRAHAM. We will keep the record open so those statements can be included.

Senator ABRAHAM. And I think we can thank the panel. I arrived late, and I don't want to extend this panel any longer. We have other votes, I think, maybe, that are going to be coming to the floor that will come up here fairly soon. So we appreciate your being here, and thank you very much for taking time with us, and we look forward to further consideration of all the nominations.

Thank you.

Mr. LINN. Thank you.

KERMIT LIPEZ

WEDNESDAY, MARCH 18, 1998

U.S. SENATE,

COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The committee met, pursuant to notice, at 10:41 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, (chairman of the committee) presiding.

Also present: Senator Biden.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. We are happy to welcome you all here this morning.

Senator REID. We don't know what to do, is our problem. Do you want us to sit down or do you want us to wait?

Chairman HATCH. Yes, let's have you folks sit down, those of you who are going to testify on behalf of your judges. Why don't you just take whatever seats are available? We will move through that way.

We want to welcome everybody to our nomination hearing today, and we are especially grateful to the nominees who are here, and are willing to serve. We welcome all of your families. We are anxious to move qualified nominees through the committee, and I look

forward to asking all of the nominees some questions.

to date, we have held 17 nomination hearings this Congress. We have confirmed 48 nominees, and we have held hearings on 58 nominees. This session alone we have confirmed 12 nominees, and this will be our third hearing.

We, are happy to have a number of Members of Congress here today to speak in favor of their nominees. I guess we will start with the two Senators from Nevada, who will speak for their nominee, and then Senator Wyden. We have the two Senators from Maine. We have Members of Congress. We have Senator Hutchinson. I hope I have all your names.

Let me at least move down the list with the-I probably should have started with the U.S. circuit court judge to begin with. But let's start with you, Senator Snowe, and then Senator Collins, then Congressman Baldacci.

STATEMENT OF HON. OLYMPIA J. SNOWE, A U.S. SENATOR FROM THE STATE OF MAINE

Senator SNOWE. Thank you, Mr. Chairman. We certainly appreciate it. Thank you.

Mr. Chairman, thank you very much for promptly holding this hearing, and I want to thank you, Mr. Biden, and other members of this committee for hearing this testimony on behalf of Kermit Lipez. We certainly appreciate this opportunity to appear before you, and I am proud to join with the rest of Maine's congressional delegation--Senator Collins, Congressman Baldacci, and Congressman Allen-to introduce you to Justice Kermit Lipez, the President's nominee for a seat on the first circuit of the U.S. Court of Appeals and to express my strong and unequivocal support for his nomination.

Justice Lipez is a scholar, with a superior legal mind, and a man deeply committed to upholding the very highest standards of our Nation's judicial system. He has a wide range of experience in all three branches of Government, a deep understanding of the roles

of each branch, and the enormous respect of his colleagues, a number of whom have written to me in support of his nomination. He

is, as Maine Governor Angus King has said, a judge of "keen intellect who has a real knowledge of the law, and a sensitivity and an

understanding of how the law affects real people."

That is why all four members of Maine's congressional delegation, representing both political parties, are here today.

Because

like so many of Justice Lipez' present colleagues, we too believe

that he will be an outstanding Federal judge and invaluable addition to the first circuit.

Of course, before that can happen, you must carefully, in response to your responsibilities here, in the committee, weigh his

record and qualifications. And I am betting that you will like what

you see.

Consider what Kermit's background says about his character and

qualifications. After 12 years in private practice, he began his career as a judge in 1985 when a Democratic Governor, Governor

Brennan, appointed him to Maine's Superior Court, which serves

as the court of general jurisdiction in the State of Maine. He served

there with great distinction for 9 years, so much so that my husband, Governor McKernan, a Republican Governor, elevated him to

the Maine Supreme Court. And that is why it gives me a special

pleasure to be here today to introduce Kermit Lipez to you, the

members of the committee.

The enthusiastic support he has received from both sides of the

aisle speaks volumes about Justice Lipez's talents and work ethic,

as well as the universal respect he has earned over his years of

work in the Maine judicial system.

The Maine State Bar Association has said, "He is highly regarded among Maine's legal community, having earned a reputation as an independent, analytical thinker." Donald Zillman, dean

of the University of Maine School of Law, put it this way: "Great

jurists are intellectually gifted, painstaking in their examination of

individual legal disputes, insistent that evidence and respect for

precedent guide them to the correct results. This has been my observation of Justice Lipez."

I would like to insert in the record two letters from the Maine

State Bar Association as well as from the University of Maine

School of Law on behalf of Mr. Lipez, Mr. Chairman.

Chairman HATCH. Without objection, we will place them in the

record.

Senator SNOWE. Throughout his career, Justice Lipez has displayed remarkable judicial acumen, thanks in large part to his

thorough, reflective, and balanced approach to his work. This approach has earned him throughout his career accolades because of

the exceptional tenure on the bench in the State of Maine.

Justice Lipez possesses precisely the kind of judicial temperament and record I think that we should expect from all of

our judicial nominees. I am certain this is due, in no small part, to influences like his father, the late Abraham Lipez,

who served as a respected judge in Pennsylvania for many years, and experiences

such as his internship with another well-respected legal mind, a

member of this committee, our friend from Pennsylvania, Senator

Arlen Specter.

In fact, Senator Specter gave young Kermit Lipez an internship

in his office when he was district attorney in Philadelphia-Kermit's first foray into the legal world.

Equally influential was his work as legal counsel to former,

Maine Governor Ken Curtis, his work as an aide to the late Senator Edmund Muskie, and, of course, his exemplary service in the

State judiciary. It is this range of experience that instilled in Justice Lipez a proper perspective on the appropriate role and appropriate constitutional limitations of each branch of our government.

Clearly, Justice Kermit Lipez not only has the professional qualifications to serve us well on the Federal circuit, but he also has the

personal credentials to match. In fact, I know how much he wanted his family to be able to share in this experience here today, and I am pleased that his wife, Nancy, and their daughters, Erica and Julia, have been able to accompany him as well on this auspicious occasion. And I hope that they could stand right now to be introduced to the committee.

Chairman HATCH. We are happy to welcome all of you here.

Senator SNOWE. In conclusion, Mr. Chairman, I am most proud to be able to come before this committee to introduce to you a candidate of the caliber of Justice Kermit Lipez. He has the qualifications, the intellect, the experience, the perspective, and the integrity to be an outstanding judge, and I am convinced you will leave

this hearing as impressed as we are.

Let me leave you with some final comments by the Bangor Daily News about Kermit Lipez and the nomination: "This region, along with the rest of the State, should feel nothing but honor that Kermit Lipez will represent. Maine on the second highest court in the Nation." And I think that we all share in that sentiment.

So I thank you, Mr. Chairman, and thank you for giving us the opportunity to meet with you the other day with respect to this nominee to meet him personally.

Chairman HATCH. Thank you, Senator Snowe. That is very, high praise, and we appreciate your testimony.

STATEMENT OF HON. SUSAN M. COLLINS, A U.S. SENATOR FROM THE STATE OF MAINE

Senator COLLINS. Mr. Chairman, Senator Biden, it is both an honor and a pleasure to join with the senior Senator from Maine and our two House colleagues in a bipartisan endorsement of the nomination of Justice Kermit Lipez to serve on the First Circuit Court of Appeals.

I particularly want to thank the chairman of this committee for his courtesy to Justice Lipez and to the senior Senator from Maine and me.

Having spent the past 12 years as a member of the Maine judiciary, Justice Lipez is a highly respected jurist. With experience at

both the trial and appellate court levels, it is fair to say that he has been tested for the position for which he has now been nominated and that he has passed that test with flying colors.

Justice Lipez is universally praised in Maine for high judicial temperament, his sense of fairness, and his intellectual capabilities.

His demeanor is consistently that of a gentleman, treating witnesses, jurors, attorneys, and spectators with the greatest respect,

and ensuring that others follow his example. He makes the courthouse a far less intimidating place for the average person.

Justice Lipez' reputation for impartiality is reflected in the high regard in which he is held by all segments of the bar. Indeed, Mr. Chairman, people who agree on little else agree on his sense of fairness. He was appointed to the Maine Superior Court by a Democratic Governor, he was appointed to the Maine Supreme Court by a Republican Governor, and he recently won praise by Maine's Independent Governor. If public trust in our court system hinges on the belief that the courtroom is a place where everyone

can expect equal treatment, no one in Maine has done more to promote that perception than Justice Lipez. The nominee is also a man who combines great intellectual acumen with considerable common sense. He has that rare ability to deal with the most cerebral of issues while keeping his feet planted firmly on the ground. Despite the talent he possesses and the respect he commands, he is a person of humility, an essential trait for someone empowered to sit in judgment of others.

Mr. Chairman, Kermit Lipez's dedication to his profession is beyond question. As a judge's son, he came to the bench with considerable knowledge and understanding of the judicial function. Yet, shortly after his appointment to the State Superior Court, he took the unusual step of obtaining a master's degree in the judicial process from the University of Virginia School of Law. Justice Lipez understands not only the powers of a judge but also--and I know this is very important to the chairman--the limits on those powers. To use his own words, courts exist to resolve

particularized disputes. They do not decide the wisdom of laws.

[They] squander their resources and their authority when they try to manage problems or impose solutions beyond their competence and their proper role." I can imagine, that those are welcome words, indeed, to hear in this committee.

Mr. Chairman, Justice Lipez has excelled in everything he has undertaken, whether as a legislative aide to the former Maine Senator Edmund Muskie, or as a private practitioner, or as a trial

judge, or as a justice on Maine's Supreme Judicial Court. I am very confident that he will also excel as a member of the First Circuit Court of Appeals, and I would urge the committee to give him your unanimous endorsement.

I thank the chairman and the ranking minority member, and I am very pleased to be here today.

Chairman HATCH. Well, thank you, Senator Collins. I am pleased to be here with Senator Biden as well.

Congressman Baldacci, you are going to have a rough time topping those two statements, is all I can say.

Representative BALDACCI. I won't even try, Senator.

Chairman HATCH. Well, I think it is a great tribute to Judge Lipez.

We will look forward to hearing what you have to say.

STATEMENT OF HON. JOHN E. BALDACCI, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF MAINE

Representative BALDACCI. I appreciate it very much, Mr. Chairman, Ranking Member Biden. I appreciate the opportunity to address you and the timeliness of the review. I appreciate all the courtesies that you have extended to the nominee and also the Senators. Without their help and support, this process would not have

gotten to this particular point. Senator Snowe and Senator Collins have been very, very helpful in working with you to see that this is handled in a timely fashion, and we do appreciate that.

I don't want to repeat everything that has been said, and I do have a prepared statement which I will enter into the record.

Chairman HATCH. We will put that in the record.

Representative BALDACCI. But I do want to say, when this position was available and Judge Cyr moved to senior status, I think

it was incumbent upon all of us to make sure that from Maine we put forth the best and the brightest. We had a citizens panel and Judge Lipez came out on top, with bipartisan support. One factor

that I think was very important is his strong sense of integrity, because I think that the public demands that when they are in the

court to have that sense from the other side of the bench. And in all areas, Kermit Lipez has been at the top of his class.

We are very proud of the prior First Circuit Court judges that have come from Maine; Justice Coffin, Justice Cyr, and now potentially with Justice Lipez, we continue to put forward the best and brightest on the first circuit, which we think is very, very important.

I do want to mention that some of the things that I appreciate are his intelligence and his outstanding analytical ability, his compassion and fairness in applying the law in an even way, and the respect that he has from his colleagues. Wherever we have gone and whatever party they happen to represent, he has always gotten the highest marks.

I will present my full statement for the record, and I appreciate the opportunity that the Chair has afforded me and the other members of the delegation.

Chairman HATCH. Thank you so much, Congressman. We are delighted that you would take time to come over and give such a wonderful statement.

Is there any other testimony from Maine, any other members?

Representative BALDACCI. Congressman Allen.

Chairman HATCH. I am sorry.

Representative ALLEN. I moved off to the side here.

Chairman HATCH. I didn't notice you there. I was so interested in what was being said, but I notice that you were going to testify.

We are happy to turn to you, Congressman Allen.

STATEMENT OF HON. TOM ALLEN, A REPRESENTATIVE IN CONGRESS FROM MAINE

Representative ALLEN. Thank you. Thank you, Mr. Chairman and Senator Biden. I am honored to be here today with the other members of the Maine delegation to speak in support of Kermit Lipez for his nomination to the First Circuit Court of Appeals. Before being elected to Congress, I spent almost 20 years as an attorney in private practice in Portland, and my practice consisted primarily of civil litigation with some public utilities law. I came to know and respect and value good judges, those who followed difficult arguments, who understand human motivation and behavior,

who know that judicial integrity cannot be compromised, and who believe that the rule of law is the foundation of our democracy.

Good judges--we have many in Maine, but Kermit Lipez is not just another good judge. He is the best that Maine has to offer.

When I spoke with one of my partners the other night, she summarized him well in three words: brilliant, fair, and polite.

Kermit Lipez brings an extraordinary intelligence and clarity of expression to his work. No civil lawyer needs to fear that his or her argument will not be understood by this judge. He is consistently fair. When it comes to criminal sentencing, this is a tough judge but always a fair judge. And I can't think of anyone else who is as widely-who leaves both sides after a case feeling that they have been heard and thoroughly heard.

Politeness may be to many an old-fashioned virtue, but to those many, the increasing number of pro se litigants struggling to represent themselves in our courts, politeness from a presiding judge affects how they will perceive our judicial system for years to come. I have read a number of Judge Lipez' decisions. They are intelligent. They are clear. They are thoughtful. And they are honest.

He is willing to call cases as he sees them, even when it is, you know, maybe not the political thing to do. This is a judge with enormous integrity.

Because Justice Lipez is the best Maine has to offer, he has today and in the past attracted the broadest possible support from Maine people. As Senator Collins mentioned, Maine's last three Governors-I think this is unique in the country-have been a Democrat, a Republican, and an Independent. Justice Lipez was selected for the Superior Court by the Democrat, Joe Brennan; he was elevated to the Maine Supreme Court by the Republican, John McKernan; and he is endorsed for this position by our current Governor, the Independent Angus King. He has the same breadth of support from the bench, from the bar, and from the public.

This Maine delegation is united in our support of Justice Lipez. He is the best we have. When I spoke last night on the phone to two of his colleagues on the Maine Supreme Judicial Court, they said, "He works hard not only on his own opinions, but on our opinions." And they would miss him if you choose, as I hope you will, to confirm him for the First Circuit.

He has been an outstanding judge for the people of Maine. He will be a model of integrity, of intelligence, fairness, and effectiveness on the First Circuit. And I thank you very much, Mr. Chairman, for giving us this opportunity to speak today for Kermit Lipez.

Chairman HATCH. Well, thank you, Congressman Allen. I don't know when I have heard any set of accolades any better than this Maine group here. So we are very proud of all of you, and I am sure Justice Lipez feels very gratified that all of you are here. So we appreciate you being with us.

Joe, do you have anything?

Senator BIDEN. It helps that you are Republicans.

[Laughter]

This means we may actually get him through here and on the floor. Lord only knows.

Chairman HATCH. I have a feeling it is going to swoosh right through.

Thank you so much.

Senator SNOWE. Thank you.

Senator COLLINS. Thank you.

Representative BALDACCI. Thank you very much.

Representative ALLEN. Thank you.

Chairman HATCH. We appreciate you all being here.

If all five judgeship nominees can come and take their seats at the table-do we have five seats down there? We will get one more seat there.

Will you all raise your right hands. Do you swear the testimony you are about to give is the truth, the whole truth and nothing but the truth, so help you God?

Judge LIPEZ. I do.

Chairman HATCH. Thank you. We are going to start with Senator Biden, because he does need to leave, if he is available. He will be right in. He is on the phone, and we will start with him and we will probably go to you, Mr. Lipez, and then go from there.

While we are waiting, I wonder if each of you would be kind enough to introduce the members of your family and your friends or anybody else that you have here with you.

Justice Lipez, why don't we start with you?

TESTIMONY OF KERMIT V. LIPEZ, OF MAINE, TO BE U.S.

CIRCUIT JUDGE FOR THE FIRST CIRCUIT

Judge LIPEZ. Thank you, Mr. Chairman. Again, I would like to note the presence of my wife, Nancy; my daughter, Julia.

Chairman HATCH. If you would all stand.

Judge LIPEZ. My sister, Dr. Joy Moser; my niece, Jill Moser; my good friend from Maine who has traveled to Washington to be with me, and my law school classmate, Bill Schaffer; my clerk from my last year with the supreme court in Maine, Lauren Fishbein; and a friend from Washington, Anita Jensen; and a friend from Maine, Jennifer Micoleau.

Chairman HATCH. Well, we are happy to welcome all of you here and we look forward to hearing the testimony.

Senator BIDEN. You are very kind to refer to me as the chairman, Mr. Chairman. I wish I were.

Chairman HATCH. I am so used to him being my chairman on Judiciary that I guess-

QUESTIONING BY SENATOR BIDEN

Senator BIDEN. Mr. Chairman, if there has to be a Republican, I am glad you are the chairman.

All kidding aside, I am delighted to see you all here. I think the President has made very, very impressive choices. Based on your introductions, I think it is clear that you all, to me, in looking at your records and the staff briefings-you all seem extremely qualified to serve on the bench.

Let me ask you all the following question. Why are you willing to do this? I am not being facetious, I am not being facetious. I will start with you, Judge Lipez. Why?

Judge LIPEZ. I have been privileged, Senator, to be a State judge for 13 years now. When I became a judge, I knew that was a career choice for me. I hope to continue and complete my professional career as a judge and this position offers me an opportunity to continue my growth in the position as a judge to deal with new problems, serve with new colleagues, and serve the public in a different capacity, and I see it as a new and welcome challenge.

Senator BIDEN. One of the questions that is often asked here is there is a great deal of talk-I am never quite sure we know what we mean by it when we ask the question, quite frankly, about judicial activism. I guess judicial activism depends on where you are

standing, but my understanding is that a judicial activist is a judge who doesn't appreciate the inherent limits on judicial authority under the Constitution and who seeks to legislate from the bench.

Although all of you have already answered a written question on judicial activism as part of your public questionnaire, I would like to ask you two questions on the definition of judicial activism. Do you believe and appreciate the inherent limits on judicial authority under the Constitution, and if you are confirmed as a Federal judge, do you plan to legislate from the bench?

Let us start with you, judge.

Judge LIPEZ. Senator, I do appreciate the limits on judicial authority and I can assure you that I have not in any way legislated

from the bench as a State judge and I would certainly not do so as a Federal judge.

Senator BIDEN. The chairman is back. But, Judge Lipez, you are going to hopefully be confirmed for the circuit; I might add, by the way, a first-rate circuit. You are about to join some judges who, I think, are among the best in the country. I mean, it is really a first-rate operation. The horsepower on that circuit is serious, I

think.

What kind of leeway do you think you have as a circuit court judge with regard to Supreme Court precedent?

Judge LIPEZ. Senator Biden, the court of appeals is an intermediate court of appeals and I would be bound by the precedents of the U.S. Supreme Court and I would faithfully adhere to those precedents.

Senator BIDEN. How do you feel about your ability and the constitutional latitude, if any, you have in terms of rejecting precedents in your own circuit?

Judge LIPEZ. I believe, Senator, that the precedents within the circuit-those decisions would have preceded the case before me-have to be carefully considered by me and I think that-

Senator BIDEN. But you don't believe you are bound by them, do you?

Judge LIPEZ. No, no, but I think they have precedential--

Senator BIDEN. Don't be afraid to say it. I mean you know, everybody is so tight around here, it is OK. If you had said to me

you felt bound by the circuit's decisions, I would not vote for you.

Judge LIPEZ. Well, I can assure you, Senator, that I am not bound by them. They simply have precedential authority that I have to consider.

Senator BIDEN. And I assume you would consider them very carefully.

Judge LIPEZ. I would, indeed.

Senator BIDEN. But unlike the Supreme Court, where you feel you are bound, you are not bound, as a matter of your view of stare decisis, by the circuit decisions?

Judge LIPEZ. That is certainly correct.

Chairman HATCH. I think you probably have. Thank you, Senator Biden. That is great.

Let me just ask a couple questions of you, Justice Lipez. What would you do if you believed the Supreme Court had seriously erred in rendering a decision? Would you nevertheless apply that decision or would you use your own best judgment as to what should be done on the merits; for example, the Supreme Court's decision in *City of Boerne v. Flores*, where the Supreme Court struck down the Religious Freedom Restoration Act, if that would be a good example?

Judge LIPEZ. Senator, if the decision of the Supreme Court addresses, controls the case that is before me, I feel I am obligated to apply

the decision of the Supreme Court, whatever personal reservations I might have about the decision. I believe that is my obligation as a judge on an intermediate court of appeals.

Chairman HATCH. OK. You have stated that as a court of appeals judge, you would be bound by Supreme Court precedent: There

may be times, however, when you are faced with cases of first impression. What would be your procedure or your methodology of resolving cases of first impression?

Judge LIPEZ. I would look first, Mr. Chairman, for analogous cases that seem to address, if not directly, at least indirectly, the issues

that are before me. I would then-if the case of first impression involves a constitutional challenge to a statute, I would look at the

plain language of the Constitution. I would consider the constitutional scheme in its entirety. I would consider the contemporary

history of the debates when the Constitution was adopted, the debates surrounding the adoption of the amendments, and try to

make my best judgment as to how the statute is compatible with

the constitutional provision.

Chairman HATCH. Let me ask you all this. Do any of you have any legal or moral beliefs which would inhibit you or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a Federal judge? Do any of you have any qualms about that?

Judge LIPEZ. I have no such qualms, Mr. Chairman.

Chairman HATCH. OK. Now, please state in detail your best independent legal judgment, irrespective of current or existing judicial

precedent, on the lawfulness under the equal protection clause of the 14th amendment and Federal civil rights laws of the use of race-, gender- or national origin-based preferences in such areas as employment decisions--that would include hiring, promotion, layoffs, among others--college admissions and scholarship awards and the awarding of Government contracts.

Judge LIPEZ. I also agree with the statements of my colleagues, sir.

Chairman HATCH. Good. Are you all committed to following existing precedent?

Judge LIPEZ. Yes, Mr. Chairman.

The CHARMAN. Well, I would caution you to realize that it is important that you abide by the rule of law. You know, we are

preaching to China that they need the rule of law, not the rule by law. And it is very important that you set examples when you get on the bench because I have to tell you that we are getting pretty tough on nominees who have the potential to be what we call activist judges.

Basically, I think both sides can agree that an activist judge is one who basically ignores the law, just does whatever that person feels they ought to do, regardless of what prior precedent or the law really says, or the express language in the law. And we have more or less radical degrees of people who currently do that on the bench. Fortunately, there aren't too many who do, but the ones who do make it very tough on a lot of others, and they make it very tough on this committee, too, because naturally we are concerned about, you know, upholding the law of the land and not just substituting your own policy preferences for what the law really is.

And I think you help the Federal courts and you help everybody who comes in the future, by being really outstanding judges. See, I don't necessarily think you have to be conservative or liberal or moderate. Just apply the law. If you do, I think people are going to be very pleased with what you do by and large. Naturally, there is always going to be somebody who disagrees, especially on this committee, but if that was the sole determinant, nobody would get through this committee. And there are those who argue very few get through anyway, but that is not quite true.

Senator BIDEN. No, no, not through the committee, Mr. Chairman.

Chairman HATCH. We have been doing our best to move nominees and we are going to keep doing that. I want to tell you that having sat through an awful lot of these, we could ask questions all day, but I am convinced that you folks have the right attitude, knowledge, background, experience, and attitude about being Federal

judges. I have often said that being a Federal judge is the closest thing to godhood in this life. Once you get there, it is very difficult for anybody to correct you afterwards. That is why it is fair to have

some criticism if we are in disagreement, but the criticism ought to be done in a very careful manner as well.

You really have an obligation not just to be yourselves and do what you want to do. You have an obligation for the whole judiciary because we do have problems here, and to the extent we get

really good judges, regardless of politics, regardless of philosophy, it just helps everybody else, and it also maintains the viability of our Constitution.

I don't know when I have seen five better nominees than the five of you and I just want to personally thank you all for being willing to serve and being willing to take these positions, I am sure, for less money than you would make otherwise, but are willing to give of yourselves to the good of our society.

Senator BIDEN. Mr. Chairman, before you close, may I make one point?

I say to the five of you that probably the one thing that those of us here who get to recommend to Republican or Democrat Presidents our candidates for the bench--the thing most of us worry

about--and, judge, you have been a judge, so you understand this more than others, I suspect, and those of you who practice will understand it. We worry, I guess, most about temperament, because

almost everybody follows precedent.

And that is not to suggest that those of us up here are always temperate, that those of us up here always treat everyone well. But we have a correcting mechanism, elections. When we are arrogant, when we are officious, when we are discourteous, we pay for it at the polls. This is your only time that you will have to pay for anything along those lines, short of a crime of moral turpitude you might engage in.

And so I hope you all remember where you came from. I mean that sincerely. Most Federal judges do, but occasionally we have observed that some view it as a beautification, as ascension into heaven, a notion that somehow, when they are no longer answerable, they are no longer required to treat people with courtesy, to

treat that young lawyer who is absolutely scared to death in his or her first case--it is amazing how many people forget how that felt. I don't know how you all felt. I remember how I felt, and I am not bad at it and I was scared to death.

So I hope you try to remember that because they are the things that ultimately either make those of us who make appointments proud or embarrassed. It is seldom the cases you decide; it is your demeanor, it is what people say about you. You all know--you have a book on every judge in your district. You lawyers sit down and you talk about so-and-so being a horse's tail, so-and-so being fair, so-and-so being a good person, a bad person, courteous, discourteous, arrogant, humble.

And we are not supposed to say this. This is kind of a fraternity deal here. You know, lawyers aren't supposed to acknowledge that, but we do. Every single judge--every lawyer practicing in the district has a book on that judge and how they are viewed. And my

plea to you all is do one little thing for those who recommended you, and that is when the day is done and they talk about you, people say, you know, he or she was a courteous, decent, kind judge.

All of you are smart, all of you are qualified, but not all of you--none of you have been presented with the notion of ever having a

job where you will get paid the rest of your life, less than you would otherwise make, I acknowledge; the rest of your life, no possibility of your salary being cut; no realistic process you will ever,

ever, ever have to give up the job, unless you want to do it. And even after you give up the job, you continue to be paid at your full salary. That sometimes changes people's attitudes. Please don't let it happen to any one of you.

I don't expect it will, but I really think-and the guy who used to say this all the time was the previous chairman, now chairman of another major committee, Senator Thurmond. It is the one thing he always asks every nominee. So in that sense, make us proud; will you? We would appreciate it, and congratulations to you all.

And thank you, Mr. Chairman, for allowing me to-

Chairman HATCH. Thank you, Senator Biden. That is good advice, and let me just say that we will do our best to get you all through as soon as we can and that should be in the very near future. This is a hard process to come through and we appreciate how difficult it is for you and we want you to feel good about it.

Senator BIDEN. I ask unanimous consent that Senator Leahy's statement be placed in the record.

Chairman HATCH. We will put Senator Leahy's statement in the record.

We want to thank each and every one of you and all your family members and friends for being here with us today. With that, we will adjourn until further notice.

STANLEY MARCUS
TUESDAY, OCTOBER 28, 1997
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:32 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Grassley, Ashcroft, and Durbin.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH,
CHAIRMAN, COMMITTEE
ON THE JUDICIARY

Chairman HATCH. If we could begin, I would appreciate it. We have a number of very important judgeships to be filled and a number of excellent candidates and nominees here today.

Today, we will move first with Stanley Marcus, of Florida, to be U.S. circuit judge for the eleventh circuit. I am very familiar with Mr. Marcus and I have a very high opinion of him, and I look forward to going through a few questions with him. Do we have our Senators here from Florida?

[No response.]

I think what we will do is, move in the order of these judges, but we will also have the Senators that are here today give their testimony for and on behalf of their nominees, and we will wait until they get here.

We will now turn to Senator Mack, of Florida. Do you know if Senator Graham is coming?

Senator MACK. Yes, he is.

Chairman HATCH. We will accommodate him when he gets here.

Senator MACK. The subway is down again, so I hope he is not caught on it.

Chairman HATCH. OK. Well, we are glad to have you here and we look forward to hearing your testimony on Judge Marcus.

STATEMENT OF HON. CONNIE MACK, A U.S. SENATOR FROM
THE STATE OF FLORIDA

Senator MACK. Thank you, Mr. Chairman and members of the committee. I want to thank you for this opportunity to introduce Judge Stanley Marcus to the committee and thank you once again for your overall responsiveness to the needs of Florida's judiciary.

Florida's judicial nominees have enjoyed swift passage from nomination to confirmation this year, and the committee is to be commended for its fine work. And, Mr. Chairman, we do appreciate that effort. It has meant a great deal to the State of Florida.

I have to say at the outset that I have never been more enthusiastic in my support for a circuit court nominee than I am for Judge Marcus. This is a nominee which the Senate can be proud to confirm, and I am confident that, if confirmed, Judge Marcus will leave the appellate bench someday with a proud legacy of judicial precedent which maintains the integrity of our legal system

and provides justice for those who come before him.

Judge Marcus was first appointed to the Federal bench at the district court level by President Reagan in 1985 after being recommended by Senator Paula Hawkins. He has done an excellent

job presiding in the Southern District of Florida since that time.

Back in 1989, when faced with an earlier vacancy on the eleventh circuit Court of Appeals, I recommended Judge Marcus for

that position. Although I was disappointed at the time that Judge Marcus was not nominated, I am truly thrilled that he is being considered for this position today. Judge Marcus can be described as one of those judges who is genuinely loved and respected by attorneys of all sides of the issues in the south Florida legal community. He possesses a superior intellect and a wonderful disposition, a priceless combination. I know from previous confirmation hearings that courtesy is a characteristic highly valued by this committee. Judge Marcus possesses this in abundance. He is friendly, well-liked, and easily approachable. Even though there is widespread happiness and support for Judge Marcus because of his nomination, it is mixed with a real sadness by those who will miss his presence on the Southern District bench. The Miami Herald called Judge Marcus an exemplar of the law. Judge Marcus would also bring to the appellate bench a reputation for being tough on crime, something that is imperative to the future well-being of our State. Prior to his service on the bench, Judge Marcus was the chief of the Detroit strike force in the Organized Crime and Racketeering Section of the Department of Justice. His excellent service in that position further adds to the weight of evidence in support of Judge Marcus' fitness for the appellate bench. I am so pleased to be here today to have the opportunity to introduce Judge Marcus. It has been a joy to interact with him throughout the years, and I expect to continue to hear great things about the legal career of Judge Stanley Marcus.

I urge the committee's and the Senate's swift confirmation of Judge Marcus, and I thank you, Mr. Chairman.

Chairman HATCH. Well, thank you, Senator Mack.

Senator Graham.

STATEMENT OF HON. BOB GRAHAM, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator GRAHAM. Mr. Chairman and members of the committee, thank you for this opportunity for Senator Mack and I to introduce not only an outstanding jurist, but also a man that we have both come to know as a friend and as a pillar of the civic and legal community of our State.

I would like to join Senator Mack in expressing my appreciation to this committee for the attention and consideration that you have given to the nominees from Florida. We had a long period in which there had been vacancies, particularly at our district court level. Senator Mack and I are pleased to say that today every position in Florida's district courts is filled, with the exception of two judges who have recently announced for senior status. So we will be before you again.

Chairman HATCH. If I might interrupt you, I think that is largely because of the efforts of you two.

Senator MACK. Thank you.

Chairman HATCH. Both of you have worked very hard to nominate really qualified, good people and the committee has appreciated that very much.

Senator GRAHAM. Well, Senator Mack and I appreciate your kind remarks, but I also realize that it is the recognition of yourself, Mr. Chairman, and your committee members of the circumstances in our rapidly growing State, with some of its special Federal judicial concerns, including, unfortunately, the high level of criminal cases generated by drug-related activities which are now being served by the full Federal bench. So today's hearing relatively shortly after

the nomination of Judge Marcus is another example of your attention to the needs in this case of the eleventh circuit. I have a full statement that I would like to file for the record, but just to supplement some of the comments that Senator Mack has already so effectively made, Judge Marcus' career combines a number of elements, from his birthplace in New York City, where he served in such disparate positions as on the city's Bureau of Budget and Housing Maintenance and as a caseworker in the State Department of Social Services and as a legal clerk and assistant U.S. attorney.

He has brought that broad experience, first, to the U.S. attorney's office in Michigan, where he initially served on and later led in the Detroit strike force that was established to fight organized crime in Michigan. His steady rise through the Department of Justice soon led him to Miami where, in 1982, President Reagan appointed Judge Marcus as the U.S. attorney for Florida's Southern District. This commenced 15 years of service which continues today to the people of our State through the Federal judiciary.

Judge Marcus' record of judicial service began in 1985 when he was nominated on the recommendation of Senator Hawking and confirmed as Federal district judge for Florida's Southern District. As Senator Mack has said, since that time he has consistently been recognized as a fair, dedicated jurist who brings out the best in the lawyers who appear before him and in the other judges with whom he serves in a collegial relationship.

He has continued his interest in academic law, serving as professor of trial advocacy at the Brooklyn Law School this year. He has

had a positive influence on the guidance of a number of young attorneys who have worked with him or been influenced by his judicial actions. Judge Marcus has consistently received the highest recognition of members of the bar who have appeared before him.

He has received in various forms the appreciation of the citizens of New York State, Michigan, and Florida for his three decades of service to the people.

I join Senator Mack in urging the speedy consideration and confirmation of the next judge to the U.S. Court of Appeals for the

Eleventh Circuit, Judge Stanley Marcus.

Chairman HATCH. Thank you, Senator.

I think, Judge Marcus, it certainly weighs very

heavily in your behalf to have these two excellent Senators here

speaking for you, and I have no doubt you will have an easy confirmation, as far as I am concerned.

Thank you both for being here. We appreciate you both being

here. It is high praise for Judge Marcus.

Senator Ashcroft, I am going to ask you to chair the rest of this hearing. I have to go to a chairmen's meeting and I will turn over the gavel to Senator Ashcroft. I am counting on him to ask some tough questions and we will move on from there.

Senator ASHCROFT. [presiding] I thank the chairman for his conduct of the hearing up until this point. It will now be our pleasure

to hear from nominees and we will first start with the nominee for the Eleventh Circuit Court of Appeals, Stanley Marcus, a judge from the Southern District of Florida.

Judge Marcus, if you would come forward, please? Judge Marcus, would you please raise your right hand?

Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth and nothing but the truth, so help you God?

Judge MARCUS. I do.

Senator ASHCROFT. Thank you, Judge. You may be seated.

Judge, we would be very pleased to have you make some initial remarks, including an introduction of members of your family who have accompanied you to this hearing today.

TESTIMONY OF STANLEY MARCUS, OF FLORIDA, TO BE U.S. CIRCUIT JUDGE FOR THE ELEVENTH CIRCUIT

Judge MARCUS. Mr. Chairman and Senator Durbin, I am deeply honored to be a nominee for this position, for the Court of Appeals for the Eleventh Circuit. I really have no statement, would be happy to answer your questions, but would like to introduce my wife, Judith Marcus, if I could, to you.

Thank you.

QUESTIONING BY SENATOR ASHCROFT

Senator ASHCROFT. Thank you, Ms. Marcus. Thank you very much for coming.

Judge Marcus, a couple of weeks ago in California, in the Ninth Circuit Court of Appeals, the court set aside the law of the State of California relating to term limits for members of the General Assembly of California and other elected officials there based on, according to the opinion of the court, the sense of the court or idea or thought of the court that the voters had inadequate information when they enacted their term limits rules for California.

In your judgment, is the thought that a court would arrive at, thinking that the people of a State were not adequately or appropriately informed or were ignorant about the issues- would that be

an appropriate judicial basis for overturning an initiative enacted by the people of the State?

Judge MARCUS. It seems to me, Mr. Chairman, that a Federal judge would step down the road of setting aside an initiative of the people with extreme caution and great care. We put our faith in the people. The people are sovereign. The Federal courts are surely the least representative branch of Government, and so we must act with great care, caution and discretion when we address issues of that kind.

Senator ASHCROFT. Well, would the ignorance of the people be appropriate grounds upon which to set aside the will of the people which had been expressed through their votes in an initiative process?

Judge MARCUS. I put my faith in the people to understand fully what they do, Senator.

Senator ASHCROFT. Less than 2 weeks, a Federal appellate judge urged President Clinton to admit his mistake of judgment and renounce the military "don't ask, don't tell" policy. He also commented that the policy's constitutionality is highly suspect. These remarks were made at a ceremony.

Do you think it is appropriate for a Federal judge to advise the President in such settings, in off-the-bench remarks?

Judge MARCUS. I think not. My own view is that when we take the oath as a Federal judge, it is extremely important that we are careful to remain within the confines of the judiciary, as embodied in article III of the Constitution, and ought to speak with great care and discretion, particularly about matters of public controversy and debate.

Senator ASHCROFT. For the last quarter century, there has been a series of cases relating to the rights of States and to the residual capacity of States to enact laws and the deliberating or otherwise calling into question the efficacy, power, or the limited scope or nature of the 10th amendment to the Constitution.

Do you believe that there are any areas in which the Constitution reserves exclusive jurisdiction to States, or is it your view that any time the Congress acts it automatically preempts the States' capacity?

Judge MARCUS. It seems to me that the Constitution is a document, a brilliant document of limited government. It provides for limited and explicit powers for the executive, legislative and judicial branches of Government. And beyond that, it leaves to the States and the people the power to decide.

Senator ASHCROFT. Judge, are there any rights that you think exist for Americans protected by the courts which do not appear in the Constitution of the United States that should be protected by the Federal courts?

Judge MARCUS. I think the Constitution is a brilliant document, perhaps the most brilliant document crafted in the name of government. It enumerates rights and powers with deliberation and care, and I think it pretty much got it right.

Senator ASHCROFT. So you don't believe there are rights that you would need to find or create in the Constitution that aren't explicitly meant there?

Judge MARCUS. I do not.

Senator ASHCROFT. Do you believe that the Constitution is a living document that is growing and that there will be rights that will suddenly appear in the Constitution or will arise in the Constitution as a result of enlightened members of the judiciary and the public in the future, or do you believe that the rights that are expressed therein in the words of the Constitution are the limits of the rights that should be expressed?

Judge MARCUS. I think the language and text is clear and it is explicit and we are bound by what it says.

Senator ASHCROFT. In the event there were to be rights which the culture felt should be added to those rights enjoyed by the members of the society, would it be appropriate for the judiciary to add those rights in judicial decisions?

Judge MARCUS. I think not. I think that there is, of course, the power to amend the Constitution if the people and their representative officials believe that that is appropriate. I do not believe that

it is the role of the judge or the court, however, to substitute its judgment for the judgment of the legislative body.

Senator ASHCROFT. So it is your view that judges cannot amend the Constitution, except through their elected representatives?

Judge MARCUS. Yes, sir.

Senator ASHCROFT. Thank you.

Senator Durbin.

QUESTIONING BY SENATOR DURBIN

Senator DURBIN. Thank you, Senator Ashcroft.

Judge, thank you for joining us today. I am a relatively new member of this panel. I have been here a year and I have the highest respect for my colleague from Missouri. We disagree on a number of political issues. I am afraid that if I would take his line of questioning and engage in a debate on those issues, it wouldn't be in the best interests of your confirmation or moving this issue along today, and so I won't.

I will ask one question, though. The Constitution never mentions the word "privacy," and yet when it comes to so many areas of interpretation, the courts have said Americans have a right to be left

alone, have a right not to be harassed by their government, and have a right to make individual decisions.

So absent that word "privacy," if you are going to take a strict construction of the Constitution, where do you find refuge for the conclusion that we should be left alone?

Judge MARCUS. I think the Supreme Court has spoken, and spoken clearly on the subject, and has repeatedly spoken about the

issue of privacy and I think that its pronouncements bind us all.

I think they have found a right to privacy in a variety of amendments to the U.S. Constitution and have spoken in a variety of

fields, including marriage and procreation, the right to raise your children and educate them as you see fit. And I think that these principles have been clearly enunciated and repeatedly upheld by the Supreme Court of the United States.

Senator DURBIN. At the risk of getting us both in trouble with the majority on the committee, I will move on to another question.

Let me ask you about the Federal Sentencing Guidelines.

Judge MARCUS. Yes, sir.

Senator DURBIN. As a district court judge, you have dealt with those quite a bit. What is your opinion of the Sentencing Guidelines?

Judge MARCUS. We have had an experience for the last 8 or 9 years and have sentenced many thousands of defendants under it in the Southern District of Florida. My own experience is that the Sentencing Guidelines have worked well. I think they have accomplished three things that they were really designed to do; first, to

compress disparity in sentence; second, to build in greater predictability and certainty in the sentencing process; and, third, to require district judges to give the reasons or explicate the rationale or its rulings and to take into account a wide variety of circumstances that the Congress and Sentencing Commission thought

ought properly to be taken into account-relevant conduct, role in the offense, prior criminal record, and so on. My own experience is that the Sentencing Guidelines have worked well.

Senator DURBIN. If you are confirmed as an appellate judge, at some point you may be faced with applying a Supreme Court precedent which you do not personally agree with.

Would you consider

yourself bound by the precedent or your conscience, and how would you make that call?

Judge MARCUS. I believe that when you take the oath as a judge, you are bound to support, uphold, and defend the Constitution and laws, and you are bound to follow the precedent of the Supreme Court of the United States.

Senator DURBIN. Thank you, judge.

Judge MARCUS. Thank you.

Senator DURBIN. Thank you, Mr. Chairman.

Senator ASHCROFT. I want to thank you very much for appearing before the committee and for coming, and we look forward to an opportunity to act on your nomination in the Senate as a whole.

Judge MARCUS. Thank you very much, Mr. Chairman. Thank you, Senator Durbin.

MARGARET MCKEOWN
WEDNESDAY, FEBRUARY 4, 1998
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:34 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, (chairman of the committee) presiding.

Also present: Senators Kyl, Ashcroft, Sessions, Leahy, Feinstein, and Durbin.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. We are happy to welcome all of you to the committee today for this hearing on a number of President Clinton's nominees.

We have the following nominees to bring before you: M. Margaret McKeown, of Washington, to be U.S. Circuit Judge for the Ninth Circuit; Richard L. Young, of Indiana, to be U.S. District Judge for the Southern District of Indiana; Susan Oki Mollway, of Hawaii, to be U.S. District Judge for the District of Hawaii; Edward F. Shea, of Washington, to be U.S. District Judge for the Eastern District of Washington; and Jeremy D. Fogel, of California, to be U.S. District Judge for the Northern District of California. We are happy to welcome all of these nominees here with us today, we are equally happy to welcome Senators and Congress people who are here to testify on their behalf. We are grateful to have all of you here.

Let me allow Senator Feinstein to testify first, since she is on the committee and would like to come up to the dais, as I understand. So we will start with you, Senator Feinstein.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Mr. Chairman, I am very pleased

Chairman HATCH. Oh, excuse me. My ranking member would like to make a statement.

Senator LEAHY. The potted plant.

Chairman HATCH. The potted plant would like to make a statement.

Senator FEINSTEIN. Never.

Senator LEAHY. That is OK. Go ahead. Senator Feinstein has already begun.

Senator FEINSTEIN. Are you sure?

Senator LEAHY. Sure. I know my place.

Chairman HATCH. I didn't think I had made a statement.

We have a number of distinguished Members of Congress here to testify in favor of these judges. So I would suggest that we go in this order: That we do Hawaii first, since Senator Inouye is the most senior Senator here; then we will go to Indiana; we will go to Washington then; and then wind up with California, if that is all right. That is the only way I know how to do this, to do it orderly and also with due respect to all of the Members of Congress here.

Senator LEAHY. Mr. Chairman, I agree with that. When I first came here as the junior-most member of the Senate, I did not like the seniority system, but now that I have studied it for 23 years,

I understand it so much better.

[Laughter.]

And I think it is a good system.

Chairman HATCH. We will now turn to Washington, and we will start with Senator Gorton and-

Senator GORTON. I will yield to Senator Murray.

Chairman HATCH. Senator Murray, then we will start with you.

Weren't you going to talk for Margaret McKeown?

Senator GORTON. We are both going to do both.

Chairman HATCH. All right. Senator Murray, we will go with you first.

STATEMENT OF HON. PATTY MURRAY, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator MURRAY. Thank you, Mr. Chairman, Mr. Leahy, Mr.

Durbin. It is indeed a delight to be here, and, Mr. Chairman, I

would especially thank you for having this hearing today. I know

you have grown tired of my many requests for a hearing for Margaret McKeown, and I am truly delighted that the day is here, and

I appreciate your efforts on her behalf.

First let me welcome Mrs. McKeown's husband, Peter Cowhey, and their daughter, Megan, who are here with us today.

Before coming to the Senate, I had heard across the spectrum that Ms. McKeown was one of the finest business lawyers in the Northwest, and now that she and I have spent considerable time together, I have come to understand why she had that reputation.

She is tenacious. She does outstanding work. She is an accomplished advocate, and she has the patience of Job.

Mr. Chairman, I enthusiastically support her for the Ninth Circuit Court of Appeals.

Chairman HATCH. That all sounds pretty good. We could use a little of that around here.

[Laughter.]

Senator MURRAY. Mr. Chairman, I am not alone in my admiration of Ms. McKeown. She has fans from both sides of the aisle.

Our former colleague, Senator Simpson, wrote this committee to say, "She is a solid lawyer with broad experience and a fine judicial temperament. I truly believe she would represent the American mainstream on the bench."

From Washington State, in addition to Senator Gorton and Representative White, who was here-and I believe he will be back-she enjoys the backing of Gov. Gary Locke, Attorney General Christine Gregoire, and King County Prosecutor Norm Mailing.

Many of her clients have written you strong letters of endorsement that I believe all of you have. She also has received backing

from a number of prominent Reagan- and Bush-era political appointees, including Bill Ruckelshaus, former EPA Administrator;

Richard Willard, Assistant Attorney General for Civil Rights; and

Mike McKay, U.S. attorney for the Western District Court of Washington.

I know you have read about Ms. McKeown's career, but let me

summarize some of the high points. She was the first woman partner at the 70-year-old prestigious firm of Perkins, Coie. She has

served for 11 years on the Perkins, Coie executive and management committees. She is a nationally recognized litigator who was

named in "Top Players in Hi-Tech Intellectual Property."

Her range of litigation is amazing. One day she is litigating

about the typeface in personal computers. The next day she is defending a securities case, and the next day she might be litigating

avionics and military aircraft.

She was president of the Federal Bar Association for the Western District of Washington and a lawyer representative to the Ninth Circuit Judicial Conference. She has worked as an aide to U.S. Senator Cliff Hansen of Wyoming, as a special assistant under President Carter to Interior Secretary Andrus, and as a White House fellow under President Reagan. She is on the Executive Committee of the Washington State Council on International Trade, and she has served as counsel for the Downtown Seattle Business Association.

While who you know is important and what you do as a lawyer is critical, where you put your priorities is also vital. One of the reasons I so strongly support Ms. McKeown is because of her commitment to community and family. I am amazed that the same person who represented Boeing in a multibillion-dollar merger and who has successfully defended Citibank in a complex leverage buyout case has also served in virtually every position in the Girl Scouts. She has been a Brownie leader, troop consultant, committee member, and for 9 years a member of the National Board of Directors of Girl Scouts of the USA and a member of the executive committee. Even with her national commitments, Ms. McKeown makes time for the girls themselves, leading her daughter Megan's Junior Girl Scout Troop 1091.

Ms. McKeown is active in other arenas as well. She volunteers in the schools, with the YMCA, with the Children's Museum, and on abused children projects.

I want to point out something special about Ms. McKeown. She has received the Good Housekeeping Seal of Approval. That magazine several years ago named her as one of the 100 Women of Promise in America.

Mr. Chairman, Margaret McKeown is a highly qualified lawyer with a diverse background who has demonstrated her commitment to community and to family. She will be an outstanding ninth circuit judge, and I look forward to working with all of you to make sure she is confirmed in the very near future and that her 2-year wait is over.

Chairman HATCH. Can I interrupt you for a second?

Senator MURRAY. Yes.

Chairman HATCH. I think you have to be careful with what you say because there are some on this committee that might require from here on in a Good Housekeeping Seal of Approval.

[Laughter.]

I am very concerned.

Senator LEAHY. Is that to require for members of the committee or for the nominees?

Chairman HATCH. I know members of the committee won't qualify.

Senator MURRAY. As long as it is not a requirement for the Senate, we are all OK, Mr. Chairman.

Chairman HATCH. I am sorry to interrupt you.

Mr. Chairman, Ms. McKeown and Mr. Shea are really outstanding nominees, and people in my State know that. As I travel

around, I get a lot of questions about judicial vacancies, and it has been hard to answer those questions. But now I can say that we are moving forward and that two excellent judicial candidates have been heard and should soon be confirmed.

Let me also add that while I am the Senator of the same party as the President, I have invited and encouraged Senator Gorton to

participate in judicial nominations. I recognize this is a break in tradition, but I know that our citizens are best served when we work together. I intend to continue working with Senator Gorton to find the very best and most able members of the Washington Bar to recommend to President Clinton, and I will fight to ensure that our citizens have their day in court and that justice is not denied because nominations are played.

So, I look forward to working with you and all the members of this committee to move these nominations forward. Thank you. Chairman HATCH. Thank you, Senator Murray. We appreciate that. That is high praise for these two nominees.

We will turn to Senator Gorton now.

STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator GORTON. Mr. Chairman, and may it please the committee, Senator Murray has given you a detailed and an outstanding

outline of the qualifications of these two individuals. She made a point at the end of her remarks that this has, in fact, been a joint process and will continue to be a joint process, as she and I and the President deal with judicial vacancies from the State of Washington, or in one case, significantly affecting the State of Washington. And as a consequence, I can join enthusiastically in the comments that she has made and need not repeat the precise points that the Senator has made.

I do want to emphasize that both Margaret McKeown and Ed Shea are highly qualified to perform the positions for which they have been nominated by the President. So, I join Senator Murray both in welcoming them and in endorsing them to you.

Now, we can't go by this hearing without acknowledging the fact that Margaret McKeown, especially, has been a somewhat controversial nomination by the President and is under criticism--criticism to which you will listen, I think formally, later on during the course of this hearing.

I may tell you that I have examined all of the elements of that criticism and find it utterly inadequate to disqualify Ms. McKeown as a candidate for appointment to the Ninth Circuit Court of Appeals. Her legal record, her professional record, has been highly

distinguished. In one sense, I have a particular advantage and a particularly good point from which to make that statement. She is a partner in the largest law firm in the city of Seattle. In my 2-year hiatus from membership in the U.S. Senate, I was a partner

in the second largest law firm in the city of Seattle. We got to know one another, the two firms, very intimately. I can say that all of the members of that Perkins, Coie firm are respected lawyers.

Ms. McKeown came up under perhaps somewhat more difficult circumstances than many others have traditionally there and is a major member of the firm.

Congressman White, who was here and whom we hope will return, was her partner there. Congressman Campbell from California, who hopes that he can return, asked me to say to you that he shared a White House Fellowship with her during the Reagan administration. Senator Simpson's interest is in the fact that Ms.

McKeown originally comes from Wyoming and worked on the staff of Senator Hansen a number of years ago. So she has an extremely broad background, and I think that she is philosophically well in the mainstream of judicial appointments over the course of the last several years.

I say all this, Mr. Chairman, because, as you know particularly,

sometimes, I think, to your regret, I have shown particular interest in this appointment process for Federal judges. I can think of few duties that we engage in that are more important. These appointments, unlike those to positions in a national administration, last

for life, last far beyond the careers of the Presidents who make those nominations. They have a tremendous impact on our society as a whole, and we do have to pay attention to them.

I must say I have more experience in this than Senator Murray, but I think she is going to find, with me, that often when you are in charge of this kind of activity and there are 10 applicants, you end up with 10 enemies and 1 ingrate. You know, there is not a great deal of political benefit to come from all of it, but it is so important that we need to pay a great deal of attention and a great deal of focus on it.

I go back to the phrase in the Constitution itself that says the President, and I quote, "shall nominate and, by and with the advice and consent of the Senate, shall appoint judges to the Supreme Court." And, of course, other judges as well. The people of the United States have chosen, I think quite consciously, a mixed government with a Democratic President and Republican majorities in

both Houses of Congress. And I believe that that imposes on all of us, Democrats and Republicans alike, not only the prerogative but the duty to advise the Senate, as well as simply to respond as a rubber stamp to that President's nomination.

In fact, earlier in this decade, the then-Senate majority leader, George Mitchell, commenting on a Senate Democratic task force on nominations and confirmations, said, and I quote him, "As the task force suggests, one way to avoid such confrontations in the future is for the President to engage in meaningful consultation with the Senate before making significant nominations. Countless historical examples justify consultations. The public supports it and common sense counsels it."

He made that when the President was a Republican and the Senate Democratic. I think it was a valid rule then, and I believe it

is a valid rule today, and I know the chairman feels exactly that way and is engaged in that kind of consultation.

Well, you know, I may say with respect to these nominations here today and with at least three, and perhaps four, that are relatively imminent, exactly that kind of consultation has taken place.

There has been a partnership between Senator Murray and myself.

There has been that kind of consultation from the White House. I cannot criticize it in any fashion whatsoever. Our advice has been sought. We have been active participants in this process. Senator Murray and I have agreed on a way in which to have selection committees that look at all of the applicants in the original instance.

As a consequence, there is another Washington nomination for a so-called Washington position on the ninth circuit before you on which we are united. If a California nominee, Mr. Fletcher, is nominated, there will be a resignation or a retirement to senior status

of another Washington judge, and we have agreed with the President on an appointment or a nomination to that process as well.

There is a vacancy at the present time in the Western District of Washington in addition to the one in the Eastern District of Washington. Senator Murray and I have agreed on a nomination

to that position.

Now, I think each of us can say that in every one of these cases, we feel that the individual whom we have picked is highly qualified for the position. At the same time, I think we are keeping a good philosophical balance on each of those courts by these picks as well.

I go into this in some detail, Mr. Chairman, because some of these nominations are controversial, and some of my colleagues, particularly on the Republican side, have questions, legitimate questions. In this case, I hope that they particularly will listen to the advice and counsel that I have in this respect as a former attorney general of my State, as being someone quite familiar with the bar, and familiar with all of the people with whom we are dealing.

And I want to emphasize that that in no way undercuts my support for these nominations. They are appropriate nominations.

They are good people, quite independently. But they are a part of a consultation process that involves a lot more names than just the names that you have here today.

Margaret McKeown has been very patient. It has got to be very difficult to practice law in a large firm such as hers when the process of becoming a Federal court judge is as drawn out as it is at

the present time. Clients obviously are, you know, wondering who is going to advise them next. And I must confess that as a part of this overall process some of the delay in her nomination can be properly laid at my feet. But at this point, we have a total and complete agreement on these nominations.

I simply want to tell you that I am very, very much in support of it. I hope other States' Senators will have the kind of partnership that Senator Murray and I have forged in this connection, and

I think we can say from the State of Washington, when we get finished with all of this, we will have made a major contribution to filling the many vacancies in the Federal courts at least in the West.

So, we are here joined together to give our strong recommendation in favor of these two nominees.

Chairman HATCH. Well, thank you, Senator Gorton. You have played a particular role in helping to break the logjam here, and we appreciate it. And we appreciate you and Senator Murray. You have kept after us on the committee to get these done, and we will sure try to get that done for both of you, as well as your State.

Senator GORTON. I guess the House has not allowed those two to come back, so if I may once again say that both Congressman White and Congressman Campbell were here particularly on behalf of Margaret McKeown, and I know that they want to add their recommendations to ours.

Chairman HATCH. We will note that for the record, and if they come back, we will try and give them some time.

Is there anyone else from Congress who is prepared to testify?

I think I got everybody.

Senator LEAHY. Mr. Chairman, could I just note this? I want to put in the record a statement from me and also from Senator Kennedy, who is tied up on the floor on the Sacher nomination, as you

know, a statement from him to be included in the record.

Chairman HATCH. Without objection, we will do that.

We will call on Margaret McKeown first, and then we will bring all of the district court judges up separately on a second panel. Ms. McKeown, if we could have you come forward,

and if you will raise your right hand. Do you swear that the testimony you are about to give in this hearing shall be the truth, the

whole truth, and nothing but the truth, so help you God?

Ms. MCKEOWN. I do, so help me God.

Chairman HATCH. Thank you.

We are delighted to have you here today and finally get you before the committee. Perhaps you would like to introduce members

of your family or any others who are here with you today. We

would love to have you take time to do that, and then any statement you care to make, we would love to hear it.

TESTIMONY OF M. MARGARET MCKEOWN, OF WASHINGTON,

TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Ms. MCKEOWN. Thank you, Mr. Chairman. I don't have a statement, but I appreciate the opportunity to introduce my family.

In addition to my husband, Peter Cowhey, and my daughter, Megan, who I believe were introduced by Senator Murray, my mother is here from Wyoming; my sister, Pat Nagel a member of the Wyoming State House of Representatives; and my brother, Mike; my secretary from Seattle, Roseanne, and her daughter; and also Lise Kenworthy.

I have a number of other friends here, but I recognize the press of time so let me just say, that I appreciate my friends and colleagues coming from Perkins, Coie, from the White House Fellows,

from the Girl Scouts, former members of Senator Hansen's staff with whom I worked many years ago, friends from law school here at Georgetown, attorneys in Washington DC, with whom I have practiced on both sides, and other friends from Washington, DC.

So, I won't introduce them, but I do appreciate their being here and wanted to let you know they are here.

Chairman HATCH. Well thank you. We welcome all of you, especially members of the family, and this is a big occasion, and it is

hopefully a good occasion.

We do have some questions and I would like you to answer them, and it is really for your benefit as much as anybody else so that we can clear the air on some of these problems that have arisen.

By the way, Senator Hansen has called me. I served with him early in my career. That kind of dates me. Senator Simpson has called. They are both favorable, very favorable to your nomination in this matter, and there have been others who have called as well.

In the motion you filed in 1994 on behalf of the Association of Churches to prevent the Secretary of State from filing Initiatives 608 and 610, you argued that the initiatives violated fundamental rights and were patently unconstitutional. This is with regard to the antigay initiative. I have made a few questions regarding the arguments in this motion.

QUESTIONING BY SENATOR HATCH

Which fundamental rights do you believe the initiatives threatened to violate?

Ms. MCKEOWN. The fundamental rights that were argued that the initiative threatened to violate that our clients, the Association of Churches, asked us to pursue were the right of freedom of speech and the right for political association and participation in the political process.

Chairman HATCH. OK. Now, aside from any personal or policy arguments, do you believe that it is a violation of the U.S. Constitution

for a State to pass a law prohibiting the placement of a child in

a home where homosexual activities are present when neither guardian in the home is the biological parent of the child?

Ms. MCKEOWN. Senator, I haven't examined that particular aspect, but I would say that with respect to homosexuality that it is

not a protected status or class, and that were a State to pass such a law, it would be presumed to be valid and constitutional. It would be given that presumption, and the particular aspect of it as to

whether it was appropriate, whether it satisfied an appropriate interest, would be something that would need to be looked at at the

time. But certainly it would be within the realm of a State legislature to be able to pass and enforce such a law.

Chairman HATCH. In the same motion, you also argued that the initiatives violated the guarantee clause of the U.S. Constitution. You

quoted an Oregon State case, a decision to support your argument that a guarantee clause challenge is justiciable in the State courts.

However, the Supreme Court has consistently held that the guarantee clause presents a political question that is not subject to judicial review.

Now, do you believe that it is constitutional for U.S. district or appellate court judges to review challenges to the guarantee clause under those circumstances? And if so, under what circumstances can they do that?

Ms. MCKEOWN. No, Your Honor; I do not believe that a political question is justiciable in the Federal court, and were a guarantee clause argument to be made, I believe it would fall into that category. In this particular situation, the argument was made in State

court, and there was precedent for such an argument in State court. But it would not be appropriate in a Federal court arena.

Chairman HATCH. OK. And in your motion, you asked the judiciary

to halt a democratic process from going forward because the initiative intruded on judicial powers. You wrote, "Only judicial decisions

may determine the proper interpretation of constitutional requirements."

Now, aside from judicial review, do you believe the judiciary should be involved in the legislative process?

Ms. MCKEOWN. No; I do not. I believe that one of the fundamental parts of our system which is very, very important is the separation of powers. And the judiciary's role is to decide cases and controversies before it. The judiciary's role is not to legislate and not

to make policy. That is a role that is delegated quite clearly in our

Constitution, and certainly under also the Washington Constitution, to either the U.S. Congress or to the State legislature.

Chairman HATCH. What do you believe is the extent of the judiciary's role in formulating public policy?

Ms. MCKEOWN. I don't believe that the judiciary has any appropriate role in formulating public policy. The judiciary is not a legislature. It should never substitute its views for that of the legislature or the Congress, but instead should review the case and controversy before it and determine the law as applied to the facts. So it has no role in public policy.

Chairman HATCH. Do you believe that it is constitutional for a U.S.

district or appellate court judge to interfere with the legislative or democratic process such as a citizen initiative if the judge disagrees with the issue or issues or law or laws promulgated by the legislative or democratic process?

Ms. MCKEOWN. No; I believe that would be totally inappropriate,

Mr. Chairman. Having come from a Western tradition, I am a strong believer in initiatives. It is something from the States in which I have lived that had been a very, very important part of the democratic process. And while initiatives, of course, are presumed constitutional and valid, they are subject to very limited review as to constitutionality which may be appropriate. And, of course, it is

also a very serious question as to whether a State initiative should be appropriately reviewed in Federal court.

But certainly the views of a judge on any particular issue or upon the particular initiative at hand should play absolutely no role in that judge's decision on the legal merits that are before the judge.

Chairman HATCH. Under what circumstances, then, should the judiciary interfere with or become involved in the legislative or democratic process?

Ms. MCKEOWN. Well, of course, I think the judiciary would only be involved if a case were brought to it. It would be extremely rare, and I appreciated what I think is nice language that the ninth circuit has suggested that any interference needs to be with very,

very extreme caution, that, of course, the initiative, if it is passed by the people or put on the ballot by the people, is presumed to be valid and constitutional, and that is a deference that the State and Federal court would appropriately show.

Chairman HATCH. Let me turn to Senator Leahy at this time, and then we will go to Senator Sessions.

QUESTIONING BY SENATOR LEAHY

Senator LEAHY. I really do not have questions as such Mr.

Chairman. I have read Ms. McKeown's background. I think that it is one of the most impressive ones we have had before this committee, and I have been here for a number of years. I think it would be safe to say you would feel strongly compelled-and this sounds like a leading question. I might ask it this

way: Would you feel strongly compelled to follow the stare decisis of your own circuit?

Ms. MCKEOWN. Yes, Senator Leahy; I would. Of course, first and foremost, I would look to the U.S. Supreme Court and to the Constitution, but I would also-

Senator LEAHY. I am assuming the absence of a controlling case from the U.S. Supreme Court or a clear-cut point in the Constitution, but assuming you have a case that appears to fall within the precedent of your circuit.

Ms. MCKEOWN. Then I would absolutely follow the precedent of my circuit, which is the ninth circuit.

Senator LEAHY. Now, you have had a great deal of time on the other side of a bench. Do you feel any difficulty in knowing that you would make the change from being a litigant for a particular side, whatever that side might be-and with your background you have had to represent a very significant and diverse number of clients. Do you feel any difficulty in making the step to where you

have this almost indefinable judicial temperament that one must have in listening to both sides of the issue?

Ms. MCKEOWN. Senator Leahy, I don't believe that I would have difficulty making that transition, and it wouldn't be a transition; it would be an absolute break from many years, 20 or more years of being an advocate in the State and Federal court system.

But I think that the breadth of my experience ranging from antitrust, securities, banking, contract, product liability, would be of assistance to me.

I have also had the opportunity over the years to serve quite frequently as a mediator in State and Federal courts, and in that capacity, I was asked as an independent third party to attempt to resolve litigation so that it would not need to go to court. We are

quite fortunate in my district, the Western District of Washington, to have a very active mediation program. And I am certainly proud that I have been able to mediate a range of cases, everything from

solving a securities class action case to resolving design and trade secret rights in a kayak company.

So I have had a range there of cases where my peers, the judges, and my colleagues have asked me to serve in that capacity. And I also recognize that there is a very big difference between being an advocate and checking your views at the door when you become a judge, where what you have done for prior clients, any personal views, would be totally disregarded, and your role and obligation as a judge is, as you mentioned in your earlier question, to follow the law. And I would affirm to do that.

Senator LEAHY. Well, let me just ask one last question, because I think it falls to that ability. Would you tell the committee-I believe I know the way the system works, but tell the committee how a mediator is chosen.

Ms. MCKEOWN. In the cases in which I have been chosen, it has been a variety of ways. In the Federal court in the Western District of Washington, we have a panel of available mediators, and we are called by agreement of the parties. So both sides usually need to agree upon the mediator, and that is one means by which I have been chosen.

The other means I have been chosen is where the parties either don't agree or through some other reason the judge has made a decision that there needs to be a mediation, and then I am asked, in effect, by appointment of the court to be a mediator.

And in other situations-and I should say all of that is done on a volunteer basis to the service of the Federal courts. I have also in situations where mediations are very lengthy and might take longer served as a mediator with half my fees paid by both or all of the many parties involved in a litigation.

Senator LEAHY. So that you basically end up in a situation where in most of these cases you are going to have to be seen as acceptable to both sides.

Ms. MCKEOWN. That is right. In these cases, in order to be an effective mediator, it is important that you have credibility both with the lawyers and the clients who are coming before you to try to reach a resolution, because a mediation is very important. If they resolve the case, it will not go to court. So, for many people, this is their day in court, and that is to have the dignity of a process to try to resolve by alternate dispute resolution rather than going to court.

It has really been a marvelous tool in the Western District of Washington to clear the docket, and I might say that our overall mediation program there has been quite successful.

Senator LEAHY. Thank you.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

Senator Sessions, we will turn to you.

QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. Thank you.

Ms. McKeown, congratulations on your nomination for a very prestigious post. It is one step below the U.S. Supreme Court, and it is an important circuit with a big caseload and a circuit that has had some trouble with the Supreme Court in recent years, and good legal skill and hard work I think is important for us.

I would like to ask you a few questions. As you know, this Senate

has been focusing on the question of judicial activism because we believe that we need to have a commitment and an understanding and a belief that the nominees we confirm are committed to the proposition that they would enforce the law as written and not use redefinition of words or other things to impose a personal agenda. And I would like to ask a few questions.

We have had a number of candidates for judicial office who have been active in the American Bar Association, and each one of them that I recall that we have asked have said in their personal view the ABA should not have taken a position on a number of controversial issues, in particular the abortion issue. And I believe, according to my information, that you supported the proposition that the ABA would take a position affirming the right of abortion in America. Is that correct? And how do you feel about that? Both two questions, number-one, first, the propriety of a professional organization taking a position on that controversial issue.

Ms. MCKEOWN. As to the propriety of the American Bar taking a position, I think in recent years there has been a lot of discussion about that, and I read and heard a number of people, including the chairman and others, commenting and I think that the organization ought to take a very, very hard look at that because the mission of the American Bar is most properly served, I believe, if they stick to their knitting, which is the professional service, lawyers, and administration of justice. With respect-

Senator SESSIONS. Well, did you sign a report recommending that the ABA adopt a position on that in 1992?

Ms. MCKEOWN. With respect to the resolution that you reference, perhaps I can explain the background of that. I was asked as one of the women members of the House of Delegates if I would support a resolution which was consistent with the Supreme Court ruling at the time, and I did so. It was consistent with the Supreme Court ruling, and I, along with others, like Jamie Gorelick, supported that resolution. I was involved in no report or related matters, nor was I proponent or activist on that issue. I simply stated my position and did so.

Senator SESSIONS. Do you believe that there is a constitutional protection for partial-birth abortions?

Ms. MCKEOWN. I have to say, Senator, that I didn't even know what that was until recently, when we have all been reading in the paper, and that I am probably as horrified and distressed as many Americans in hearing about that.

As far as whether there is constitutional protection for it, I think you can appreciate that because that debate is in Congress now and because that is potentially an issue that could come before the circuit, that it would be inappropriate to state an advisory opinion. However, it is important to note that if you-in my reading of the Supreme Court law at this time, that there is no absolute right to abortion, and the Supreme Court has made it quite clear that there are a number of restrictions that have been appropriately upheld, and they are using what I understand to be an undue burden standard. And so, as that issue moves forward in both public

debate and perhaps here in Congress, I believe that the courts will apply the Supreme Court rules recognizing those limitations.

Senator SESSIONS. Well, I just would point out that abortion is one of many issues that demonstrate the concern of citizenry who believe that they ought to have the authority to make popular matters of social and public and health policy, and by ripping it out

under the guise of interpreting the Constitution and saying this is a constitutionally mandated is an antidemocratic act in a way. It

removes-makes it almost impossible for the people to speak. So those are some of the concerns we would have there.

Let me ask you about the gay rights initiative, a brief that you wrote. Senator Hatch has asked you some about it. Essentially it was like the Colorado initiative, although I suppose more complex and with some additions to it. But essentially it would deny a protected or special status for homosexuals constitutionally in the State? Is that what the purpose of those resolutions were?

Ms. MCKEOWN. I believe that that was one of the purposes.

These were, as you accurately characterize, fairly complex because, unlike the Colorado resolution, which I have read because I read the Supreme Court ruling in *Rohmer*, it was fairly succinct and to the point. These initiatives were several pages long and covered a variety of subjects. That was one of the subjects.

The initiative challenge was really to the participation in the political process as opposed to the specific substance of these initiatives.

Senator SESSIONS. You filed a brief in that case. I know you are-were, at least at one time, chair of the Legal Committee of the American Civil Liberties Union. Did you file that as an American Civil Liberties Union attorney or as a private attorney? Or how-

Ms. MCKEOWN. No.

Senator SESSIONS. [continuing] Did you come to file that brief?

Ms. MCKEOWN. The brief that I filed there was on behalf of the Washington Council of Churches, which is an organization of many denominations-Baptist, Catholic, Methodist, and Presbyterian-in the State of Washington. I did not represent the ACLU in that litigation, Senator Sessions.

Senator SESSIONS. When you argued that case, I know you are an advocate, but you argued that the initiatives violated the equal protection clause-well, let me-I guess one of the cornerstones of the American Civil Liberties Union is their belief in free debate and free speech. So I am troubled by the attempt in your brief to have the court cease-or deny the people of the State the right to even vote on the question. Normally I would think it would be the equivalent, would it not, of filing a motion to say that the State legislature should cease debate or not be able to vote on a bill because

it may be unconstitutional? And isn't that against the principle of free speech and public debate?

Ms. MCKEOWN. I appreciate the analogy there, but would suggest that this might be somewhat different. The specific issue in Washington which was in the State court was first and foremost a procedural one, and that was simply whether under our State constitution and the various statutes that govern initiatives, whether this particular initiative met those rules and procedure. So that was really the primary and first argument. That was followed by a constitutional argument, and obviously there is a tension there between wanting to let initiatives go forward, which, I think, they should. As I said, I believe strongly in the initiative process, but we were asking the court to determine whether this particular initiative met Washington's own procedural guidelines, because under

Washington precedent there has been situations where the court felt it appropriate to look at a preelection review in these very, very narrow circumstances.

As you know, I am sure, from reading of the papers, the judge determined that we had made a showing of likelihood of success on the merits, but brought up the competing interests which you mentioned and determined that at that juncture it shouldn't proceed.

I had a fairly limited involvement in that. It was brought to me

by some associates in my firm asking if I would assist them, and after these court rulings, then that was the end of my involvement in that issue.

Senator SESSIONS. Did you sign that brief?

Ms. MCKEOWN. I did, absolutely, Senator Sessions. Yes.

Senator SESSIONS. Mr. Chairman, I don't want to take more time than I am allowed.

Chairman HATCH. Do you need a little more time?

Senator SESSIONS. I had a few more questions I would like to ask.

Chairman HATCH. How much more time do you think the Senator needs?

Senator SESSIONS. Maybe 5, 7 minutes.

Chairman HATCH. Would that be all right with you, Senator, if he finishes his questions?

Senator DURBIN. Sure. Of course.

Chairman HATCH. Then we will turn to you.

Senator SESSIONS. Well, I guess what troubled me, one of the quotes from your brief was, "The mere process of permitting an election on these initiatives would cause substantial and irreparable injury to individuals whose fundamental rights would be subjected to a popular vote."

That language troubled me, and I guess you have given an explanation for that.

Ms. MCKEOWN. Would you like me to comment on that specific language?

Senator SESSIONS. Yes; you could comment on that, if you would like.

Ms. MCKEOWN. Sure. As has been recognized here before, I was there as an advocate, and there the notion that there would be irreparable harm was based on testimony or affidavits that were provided by individuals, including members of the client organization.

And that was their factual judgment. We took that, as we do in every case, whether it is an antitrust case or a trade secret case, took those facts and applied them to the law. And it is a very, very high standard on injunction.

Senator SESSIONS. Yes; it is.

Ms. MCKEOWN. It is a very high standard, and the argument was that, in their view, they would be irreparably harmed. Of course, it was for the court to determine whether, given the facts as they presented them and as we argued them on behalf of the client, they met that standard. In this particular-

Senator SESSIONS. If you had been judge, you might have ruled against your motion?

Ms. MCKEOWN. That is probably true.

Senator SESSIONS. I think you would have done well to have moved against your motion.

Ms. MCKEOWN. I think I probably would. But I have to say that I tried to argue within the law, and I believe I have a good track record. But you win some, you lose some.

Senator SESSIONS. Well, later on you said on the guarantee clause-the chairman referred to the clause that guarantees a republican form of government. You argued that that prohibits "initiatives that violate the principle of equal participation by all qualified voters in the political process," I believe in your brief. That

troubles me as indicating a position pretty far outside of what I would understand to be the province of an initiative. Would you explain that?

Ms. MCKEOWN. Yes. I had mentioned before that because this was in State court, and in this particular case because our clients wanted us to advance this argument, we did so and, in doing that, determined whether or not it would be appropriately argued in State court. And because there is precedent that the guarantee clause does provide a certain amount of scrutiny of initiatives in State court, that argument was made.

The argument was not in any way intended to suggest that the guarantee clause was contrary to initiatives or that in any way initiatives were somehow disapproved or outlawed by the guarantee

clause but, rather, under the republican form of government that if there were two classes of citizens that were created, that it may be appropriate for the court to look at that as one further measure of whether this particular initiative, as drafted, and the initiative that was before the court was appropriate on equal protection grounds.

Senator SESSIONS. Well, in the ninth circuit, we have had a number of important cases in which judges have taken it upon themselves to reverse initiatives and declare them unconstitutional. I think most of those earlier opinions have been reversed by higher courts. And I think we need to respect that. I think that is-the height of equal participation by all qualified voters is an initiative, and I certainly don't think it is antidemocratic. And it is particularly antidemocratic for a lifetime-appointed judge, no longer accountable to the voters, to be a bit cavalier, as I think some of these decisions have been in reversing the will of the people. It is an important issue.

Let's see. With regard to the ACLU, it has taken some very good positions over the years and stood for some very important positions. But it also has a history of taking positions that, I think, are

outside the mainstream. Are you still a member?

Ms. MCKEOWN. No. My participation in the ACLU was sometime approximately early 1980's.

Senator SESSIONS. Let me just ask a few questions. Do you believe that the death penalty violates the Constitution of the United States?

Ms. MCKEOWN. No. I believe it is quite clear that the Supreme Court has spoken and the death penalty absolutely does not. It is constitutional.

Senator SESSIONS. Well, the ACLU adheres to that view, does it not?

Ms. MCKEOWN. I honestly don't know what the ACLU-

Senator SESSIONS. I think that is an official position on it.

Ms. MCKEOWN. I haven't been active in it, and I don't know what positions they have taken.

Senator SESSIONS. Well, what was your position? You did hold a position with it.

Ms. MCKEOWN. Yes. For about an 18-month period, I was the chair of a legal committee for the ACLU.

Senator SESSIONS. What would the legal committee do?

Ms. MCKEOWN. The legal committee looked at cases that were brought to it by the staff, and I understand basically from individuals who may call in and request representation on an issue. Various members of the legal committee wrote something kind of akin to a bench memo, what the pros and cons were of the issue, and the committee would meet to determine if there were an issue and to see if there were an attorney available in the community that

would be willing to take that issue.

Senator SESSIONS. Just briefly, the ACLU has opposed officially the three-strikes-you're-out sentencing laws that have appeared around the country. Do you share that view?

Ms. MCKEOWN. I do not share that view.

Senator SESSIONS. They have opposed school vouchers for sectarian schools, arguing that it is unconstitutional. Do you share that view?

Ms. MCKEOWN. I have never taken a position or a view on that. I think that in light of the recent Supreme Court decision in the area of schools that this is an issue that may come before either a district or a circuit court, so I wouldn't-

Senator SESSIONS. I would respect that.

Ms. MCKEOWN. [continuing] To render an opinion, but I certainly recognize and am quite aware of the U.S. Supreme Court rulings on this, and it is not an issue I have ever had any involvement or occasion to give an opinion on.

Senator SESSIONS. Just briefly, opposition-they have opposed using V-chips in televisions to screen violence, presumably under the Constitution, some principle of the Constitution. Do you adhere to that view?

Ms. MCKEOWN. I can tell you I don't know what the ACLU's position is, but I can tell you as an intellectual property lawyer that

I have looked at that, and I believe that and hope that V-chips and other technological solutions will get even more sophisticated so that we can use them to protect children and others. And I think it is an appropriate use of technology.

Senator SESSIONS. Well, it would appear to me so, and I am surprised that the ACLU would oppose that. It is certainly free choice.

Opposition to voluntary labels on music albums have been one of the positions, and opposition--do you share that view?

Ms. MCKEOWN. Again, I have not had occasion to look at that, but as an intellectual property lawyer and somebody who does deal in the copyright area, I know that a number of my clients have looked quite seriously and felt that that is an appropriate way to go so that they can quell some of the controversy.

Senator SESSIONS. I would certainly agree. And they have supported decriminalization of drugs. Do you favor that? And have you ever spoken in favor of that?

Ms. MCKEOWN. I do not favor that. I do not favor decriminalization of drugs. And your question to me is the first time anyone has asked me to take a formal position. I haven't been involved in that issue before.

Senator SESSIONS. Well, I have been involved in the effort against drugs for a long time and invested a lot of effort, and I think that it is a very detrimental problem for America, the use of drugs.

Ms. MCKEOWN. I agree with that.

Senator SESSIONS. What about a moment of silence in school? The ACLU has opposed that, the organization that you have been a member of. Do you favor that? Do you oppose a moment of silence in school?

Ms. MCKEOWN. Senator Sessions, I am a believer in religious freedom, and, again, on that specific issue, because it implicates potential constitutional issues and issues on which the

Supreme

Court has spoken, at least, around, I think it would be inappropriate to render an advisory opinion on that.

Senator SESSIONS. Well, you know, I don't think you are bound by the positions, every position of an organization that you join.

But, I think, for some of the reasons I have just raised, that is why I have not chosen to be a member of the ACLU.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

Senator Durbin.

Senator DURBIN. Ms. McKeown, welcome to the committee.

An impressive list of supporters, including Congressman Tom Campbell, Republican of California, who has now rejoined us-

Chairman HATCH. Senator Durbin, I wonder if we could interrupt and allow the two Congress people to testify.

Senator DURBIN. Sure. Of course. I think that is a good idea.

Chairman HATCH. So that they can get back to their important work. Would you mind, Ms. McKeown?

Ms. MCKEOWN. Absolutely not, Mr. Chairman.

Chairman HATCH. If you two will take these two seats, then we will take your testimony first, Tom, and then, Congressman White, we will take your testimony. Go ahead.

STATEMENT OF HON. TOM CAMPBELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Representative CAMPBELL. Mr. Chairman, that is awfully kind of you. Thank you, and thank you, Senator Durbin.

Chairman HATCH. I am sorry I didn't notice before.

Representative CAMPBELL. And thank you, Senator Durbin, my former colleague, Senator Sessions. My colleague and I, Rick

White, both members of the Republican Party and Republican Conference, had to make a vote over on the floor, and so we missed-

Chairman HATCH. We understand.

Representative CAMPBELL. I had this to add. It is short but it is very important, I believe. I met Margaret McKeown when we were both White House fellows. We met in the summer of 1980. She was assigned to the Department of Interior, and I was assigned to the White House. Then the election came, and she was transferred over to the White House.

That was a time of some difficulty for White House fellows. It is one of the few occasions where the White House Fellowship Program, a nonpartisan program, is tested by the necessity to move

between two administrations. And I just want to mention-more than mention, I want to emphasize that Margaret dealt with that difficulty and the political aspect of it in absolutely the finest fashion. A time that could have been one of great strain, a time that

could have been one of partisanship, she instead served her country admirably for the Secretary of Interior, Cecil Andrus, I believe, and then moved over to the White House under President Ronald Reagan. Curiously, I moved from the White House under Ronald Reagan to the Justice Department under William French Smith.

So, I know from that particular personal episode and knowing her personally during that that she displayed the very finest of demeanor, patience under a partisan, potentially partisan strain.

Second, as you have been kind enough to hear me on occasion on antitrust matters, that is my field. I am a professor at Stanford

Law School. I have been teaching antitrust since 1983. And Margaret McKeown is very well known and highly regarded in the field

of antitrust, and I mention that because it has a very important component in the Federal judicial jurisdiction and will obviously be part of her duties as a ninth circuit judge.

Mr. Chairman and Senators, thank you for the exceptional courtesy you have shown me. On the matter of judicial temperament

and knowledge in the field in which I have a little bit of background, I recommend Margaret McKeown enthusiastically.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Congressman. We appreciate your testimony. And, Ms. McKeown, I have, as you know, great respect for Congressman Campbell and especially his knowledge about antitrust, and we appreciate your testimony. I can see now why you were willing to allow these two gentlemen to interrupt you.

[Laughter.]

Congressman White.

STATEMENT OF HON. RICK WHITE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Representative WHITE. Thank you, Senator Hatch. I appreciate it. Senator Durbin, Senator Sessions, thank you very much.

I have very little to add in terms of concrete facts, but I do think I have a personal perspective that maybe other witnesses have not had since I have known Margaret for, I guess it is 15 years already. She was essentially my boss in the first 3 or 4 years that

I worked for a large law firm in Seattle. Then she was my partner for 5 or 6 years after that, and I have really seen her in a variety of situations. And I just want to emphasize to the committee that probably none of us in a law firm of that size agree with everything that all of our partners do. But I can tell you that Margaret was held in the highest regard by all of us. She is one of the most honest people you will find, one of the most capable you will find, one of the fairest people you will find. She is an absolutely first-rate lawyer, and I think she would make a fine judge.

So, I just thought you would appreciate hearing that from the perspective of someone who has practiced with her or a long period of time.

Chairman HATCH. We do appreciate it, and that testimony is very powerful here because you did practice with Ms. McKeown. And, frankly, I have been very impressed ever since I first met her in my office. Naturally, sometimes when you do represent controversial issues, you can be questioned about it. I mean, let's face it. And

attorneys represent clients, and sometimes they are clients that are unsavory. Sometimes they are clients with wacky ideas, like the ACLU.

[Laughter.]

Actually, some of my most enjoyable moments here have been when I have agreed with the ACLU. They have been rare, but the fact is, they do a lot of good in many ways. And they are important in our society, as are antithetical organizations.

So we really appreciate your making this effort, and for you to come over twice in between votes, I think, is a real tribute to you, Ms. McKeown, and we are grateful to have you here.

Representative WHITE. It is always an honor to be on this side

of the Capitol. Thank you very much.

Chairman HATCH. It is an honor for us to have you.

Representative CAMPBELL. I would never seek it myself.

[Laughter.]

Chairman HATCH. But we know how you feel.

Representative CAMPBELL. Thank you, Mr. Chairman.

Chairman HATCH. Senator Durbin.

QUESTIONING BY SENATOR DURBIN

Senator DURBIN. I want to thank both the Congressmen. The only thing I can say that might assault the credibility of Congressman Campbell is that he grew up in Chicago and moved to California.

Representative CAMPBELL. St. Ignatius.

[Laughter.]

Senator DURBIN. But he still kept his loyalties there.

Ms. McKeown, as I started out saying, you have an extraordinary array of support. In fact, your support from the Republican side of the aisle, at least in the list given to me, is as strong or stronger than your support from the Democratic side, and to have both U.S. Senators testify-

Chairman HATCH. Don't say that. I have had enough trouble.

[Laughter.]

Senator DURBIN. But let me ask, How long has your nomination been pending before this committee?

Ms. MCKEOWN. I believe I was nominated in March 1996.

Senator DURBIN. So, it is just a couple months short of 2 years that you have been waiting. Have you had a hearing before?

Ms. MCKEOWN. No, Senator Durbin, I have not.

Senator DURBIN. I might say, and I know the chairman understands our general party position on this, that I think that sometimes these delays can cause real personal hardship and professional hardship. I have had a number of judicial candidates in Illinois contact me after only a few months saying, "I didn't realize what a pain this would be. A lot of clients are asking if I'm going to be around next month, and my family would like to know about my future." So, I am glad you are here today, and not dwelling on why it took so long, I think we should just try to focus on the important job ahead of us in making certain that you have your fair chance here to testify.

I don't think any of the people gathered here today will be surprised to hear some of my colleagues from the other side disavow

the ACLU. They may be surprised-and shouldn't be, either-that they also disavow the American Bar Association, all its works and all its pomps. And it comes as a surprise to me, as I hear many of these witnesses who are questioned seriatim on a wide array of issues which many of us demand time to reflect on before we would respond to questionnaires. And I just heard the array of ACLU issues that you were asked to respond to, and I thought your answers were all reasonable. But it really is a departure, I think,

from what I recall has happened in previous Congresses before the Judiciary Committee. Those questions were usually reserved for Supreme Court nominees, and most of the times they would say, "I'd rather not answer. I may have a case coming before me that might have an issue of that type."

And so, I wonder if maybe we are going down a path here that might be a little dangerous if we-

Chairman HATCH. I can assure you, Senator, that these questions

have been asked for the last 22 years I have been on the committee in various forms. So, it is just part of what we do here.

Senator DURBIN. Well, let me just question whether we should continue to, because I am not sure that it is a smart way to go.

I mean, if there is going to be a conservative nominee from a Republican coming before this committee and I am going to have to

call out the agenda of the landmark Legal Foundation, the Federalist Society, and the Washington Legal Foundation and the Rutherford Institute and find out where they stand on every one of the

cases that those groups have brought, I don't know that that necessarily serves our purpose. And I hope that-and I don't want Ms.

McKeown to become the focal point of all this, but I hope that our approach to this will be with a little broader brush.

The testimony that I have just heard from two Republican Congressmen about Ms. McKeown is compelling, these people who have

nonpolitical axe to grind but happen to know her, know her values and her background, and that makes all the difference in the world to me.

Let me also ask you a couple things about this initiative that you were involved-

Senator SESSIONS. Mr. Chairman, a matter of personal privilege, may I make a comment?

Chairman HATCH. Yes.

Senator SESSIONS. I do not believe Senator Durbin would ever contend that a member of an organization who came before this committee to be confirmed for a judge couldn't even be asked about the positions that that organization took. We have asked those questions, and we have allowed her to answer those questions on some controversial issues that I think are important to ask. And I just would feel strongly that the Senator would be out of line and would not want to bind himself to that position.

Senator DURBIN. Let me-

Senator SESSIONS. If a Washington Legal Foundation attorney came here, I think you ought to be able to ask him about the positions they have taken.

Chairman HATCH. Let me do this. Whenever one side or the other has been in the majority, we have had some instances with which the other side has disagreed. I can point to plenty of illustrations when the Democrats were in the majority where a lot of tough questions were asked that Republicans didn't always like. So, I would rather avoid that here because I think any Senator has a right to ask, on this committee, any question that that Senator cares to ask.

Now, I have to say I think sometimes it is wiser to ask some questions rather than others, but I am not going to judge my colleagues on that, and I find nothing wrong with the questions that

have been asked here today.

But let me say this: I have an interest-I for one am one of the happiest in having Ms. McKeown before the Senate committee today. You were caught in a very serious set of problems-and if I could just take another minute, Senator Durbin-involving the Ninth Circuit Court of Appeals, which to many Republicans is out of whack, the most reversed circuit court in the country, time after time after time, with some of the leading activist judges in the country-not some, the leading activist judges in the country, who are condemned in many respects by many in their own profession

and party for what they are doing. And it is a matter of great concern.

We also got into that bind on whether we should divide the circuit or not, and it finally was resolved with a commission at the

end. And I hope that we can resolve it in a satisfactory way for the various States involved.

I think you are going to find it is going to be difficult for us to do that any better than what they were trying to do last year. But give it another chance. But you were caught up in that, plus there were other factors, some of which were valid and some of which were not, in my opinion. So there is plenty of reason for people to feel a little bit badly here, and I, for one, feel badly that it has taken us so long to get you before the committee.

But with that, I hope we can not get into any fights here. If we are going to do that, let's do that when your nomination comes up before the committee in the markup. But let's ask questions, if we can. I am not-like I say, you can ask anything you want, but I would rather stick to this matter of getting your confirmation hearing over so that we can move you in committee. And I will assure

you that unless something comes up that we don't presently foresee, we will try to bring you up for markup in the committee within

the next few weeks. And I do agree with Senator Durbin that it is a bad thing for this committee to, in the few cases that we do-and it has been done by Democrats, and it has been done by Republicans-to have long delays, because it is very difficult for the nominees who are in practice to phase down their practice and know when to phase it down, how to phase it down, and in many cases they have to phase it down in order to be able to meet the obligations of confirmation when it occurs. And I agree with that, and let's hope that we all on this committee will do a better job this year than we have done in the past.

But we are also prodding the administration to do a better job, in getting nominees up here, qualified nominees, and when they do, they go through fairly fast except with some exceptions, and yours is one of those, and I apologize to you.

Senator Durbin.

Senator DURBIN. Mr. Chairman and Senator Sessions, I suppose the bloom is off the rose when it comes to these questions, and maybe we have now established it as the standard for this committee. And I will not stand here and say that on no occasion will I ever consider asking those questions. But I wonder if it really is in the best interest of finding the best judges. Maybe it is time for us to reflect a little bit on the standards that we use and the approach that we use, and that is, I hope, worthy of our attention.

Chairman HATCH. I just bring to your attention, Senator Durbin, that we felt exactly the same way when the Democrats controlled the committee during some of those markups, during some of those hearings. So, in all honesty, I agree with you. This should be a civil, decent, good process in every way, and we are trying to do that. And I will say this: One of the best and most active people in seeing this process is good has been Senator Sessions, and you also, because both of you have played significant roles in the confirmation of these judges over the last number of years. You have chaired a whole-many more hearings than almost any other Senator. So, I am personally very appreciative, and I think you have taken these matters very seriously. It means a lot to me. I think

it should mean a lot to the country.

I am sorry to interrupt you again.

Senator DURBIN. Mr. Chairman, I hope, regardless of the history of the committee, that we might rise to the occasion here. I think people are looking for us to do things a little differently and a little better, and perhaps we could agree on a bipartisan basis to do that.

Chairman HATCH. You bet.

Senator DURBIN. Let me ask a question or two of Ms. McKeown about the pro bono work. We have focused on the pro bono work which you were engaged in for the church group, the one involved in the ACLU. From your background, though, I see you have done extensive pro bono work for other organizations. Is that not true?

Ms. MCKEOWN. Yes; I have, Senator Durbin. Probably something

I am most proud of is a case I took on appointment from the Federal court in Tacoma involving immunity of court reporters and

successfully argued that to a 9 to 0 decision in the Supreme Court, reversing the ninth circuit, Senator Sessions.

Senator DURBIN. U.S. Supreme Court.

[Laughter.]

That is not too hard.

Ms. MCKEOWN. That was an endeavor that I spent about 5 years and literally hundreds and hundreds of hours, and I believe the initiative was brought up here, and that was a very, very small amount of time.

In addition, I have worked on cases for individuals such as a guardianship for a World War II veteran, the standard landlord-tenant or consumer problems that people have had that have come

through our firm's pro bono program. I have done legal work for the Girl Scouts and the Downtown Seattle Association, and other nonprofit organizations. And, of course, as far as my community pro bono commitment, the bulk of my time has really been the hundreds and hundreds of hours I have spent with the Girl Scouts.

Senator DURBIN. Well, I think that those experiences speak very clearly to who you are, what your values are. I know that you have been engaged in some controversial work here, and it has been noted by this committee. And I think many of us-I happen to believe that that is one of the responsibilities of a professional, one of the responsibilities of an attorney, and many of us have argued vigorously for clients when asked personally in our own private side we might have a different view of things. And I hope that I won't be held to every argument that I have made in court for a client, because I just did my very best to represent them, everything within the law, even trying to push the law where I could to the benefit of my client.

So, I think your pro bono work, in fact, speaks well of you and what you stand for, and the case or two that have been highlighted here I don't think really tell the story. As they used to say of the critics of Abraham Lincoln, they make of his warts his whole face. And I don't think that should be done to anyone. We should be looking at you in your totality.

You have been here awhile, and there are many who are going to follow, and I promised the chairman I would be brief. I want to thank you for joining us today, and I wish you the very best. You certainly have my support.

Ms. MCKEOWN. Thank you.

Chairman HATCH. Well, thank you, Senator.

And, Ms. McKeown, if we don't have any further questions, I want to congratulate you for this nomination. I think the President has chosen a good person, and I hope that we can move your nomination in the near future, and I will do my best to do so.

I want to thank you for, appearing before the committee and for coming and visiting with us. It has meant a lot to me personally. So, with that, we will allow you and your family to go, and I hope this hasn't been too difficult for you.

Ms. MCKEOWN. No, Senator. Mr. Chairman, it has really been an honor to be here. I have appreciated the questions and the opportunity to be here, and I have appreciated the courtesy shown me.

Thank you very much.

Senator SESSIONS. I am sure you have had a lot tougher questioning from some of the judges you have appeared before.

Chairman HATCH. Life will get even more complex, I think, as you enter on the bench.

Ms. MCKEOWN. Thank you to the Senators and to Mr. Chairman.

Chairman HATCH. Thank you.

RICHARD PAEZ
WEDNESDAY, FEBRUARY 25, 1998
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Charles E. Grassley presiding.

Also present: Senators Thurmond, Specter, Sessions, Leahy, Feinstein, and Durbin.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I am Senator Grassley. Obviously, I am not chairman of the full Judiciary Committee. I am a member of the Judiciary Committee, and Senator Hatch has asked some of us, because of his very busy schedule, to help with the agenda. And so today I am doing that. I am glad to participate because we all have a responsibility to take very seriously nominees to the various courts.

With that in mind, I would like to say that today is the 16th nominations hearing held by the committee during the 105th Congress. Four of those hearings were executive branch nominees, with the remainder being judicial nomination hearings. So far this Congress, the committee has processed 52 judicial nominees, not including the six nominees before the committee today. Of those 52 nominees, 41 have so far been confirmed. Six nominees have been reported out and four nominees are pending in the committee. Three of the administration's nominees have been withdrawn. By comparison, in February 1990, only 17 nominees had been confirmed by February 1.

Senator Leahy is at the funeral of former Senator Ribicoff. He has a statement that he asked to be entered in the record. And Senator Feinstein is here as a member of the committee and as a member of the Democratic Party. It says here we will expect Senator Feinstein here, and she is here.

Senator FEINSTEIN. Thank you.

Senator GRASSLEY. You bet. So Senator Leahy's statement will be put in the record.

Senator GRASSLEY. I would go to Senator Feinstein, and then I am going to go to Senator Thurmond. Or do you just have questions, Senator Thurmond?

Senator THURMOND. I just have questions.

Senator GRASSLEY. OK Senator Feinstein, and then we will call our colleagues who are here to speak for nominees.

Senator FEINSTEIN. Yes, thank you. I have no opening comments, and I know there is a California nominee up. I will defer to my colleague, Senator Boxer and since I am going to be here for the tour of duty, I will withhold my comments on that nominee for a more appropriate time.

Senator GRASSLEY. I would ask Senator Boxer and Senator Wyden and any other Senators to come at this point to speak for their nominees. We would start with the Senator from California.

STATEMENT OF HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Thank you so much, Mr. Chairman. Thank you, Senator Feinstein, Senator Thurmond.

I am very pleased to introduce Judge Richard Paez for a seat on

the Ninth Circuit Court of Appeals. I would ask Richard if he would stand. Do you have your family here? If they could stand as well, that would be wonderful.

Mr. Chairman, I first introduced Richard Paez to you and to the committee in 1994 for the district court, and I was so proud that the Senate saw fit to confirm him that same year. Judge Paez became the first Mexican-American to serve as a Federal trial judge

in Los Angeles. He has been serving with distinction, and he is widely respected. I am sure you will once again find him eminently qualified to sit, and this time on the circuit court bench.

Judge Paez has broad support. For example, he is supported by Republicans Sheriff Sherman Block of Los Angeles and Sheldon Sloan. Sheldon Sloan was the former chairman of the judicial selection committees for Senator Pete Wilson-then-Senator Pete Wilson and then-Senator John Seymour.

For more than 20 years, Judge Paez has distinguished himself as a public servant in the best and broadest sense. A native of Utah,

Judge Paez received his undergraduate degree from Brigham Young. In 1972, he graduated from Boalt Hall School of Law at the

University of California. Judge Paez was appointed to the Los Angeles Municipal Court, which is one of the largest metropolitan

courts in the country, and served for 12 years there. While on the municipal court bench, he was deeply involved in teaching, lecturing, and training within the judiciary.

A recognized leader, his colleagues elected him to serve as both supervising judge and presiding judge. His merit was again acknowledged when he was elected chair of the Los Angeles County

Municipal Court Judges' Association. In 1991, Judge Paez was appointed by California Supreme Court Chief Justice Malcolm Lucas

to the first of two terms on the prestigious California Judicial Council.

Mr. Chairman, as an attorney and as a judge, Richard Paez has devoted his life to fairness, equality, and justice. And if the committee chooses to again show confidence in him, as you have done

before, I know he will serve on the Ninth Circuit Court of Appeals with the highest level of integrity and distinction that have been so characteristic of his entire career.

Thank you so much for the honor of giving me this opening time.

Senator GRASSLEY. Thank you, Senator Boxer.

I would call on Senator Feinstein to speak about the nominee Paez, and in the meantime, I would ask the three or however many Members there are of the House of Representatives here to come to the table to be in place for me to call on you next.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I am particularly pleased that the nomination of Judge Richard Paez is scheduled today, because he has been waiting for a long time.

I know in my selection process and in the nominees I present to the President, it is always important, I believe, to have some knowledge of whether an individual actually has tested the judicial temperament. I believe in this case, that test has been firmly met.

I think you will find that observations of Judge Paez show that he is firm, he is fair, he is experienced, and that he has a positive and good judicial temperament. I don't mean to say that everybody has to have been a judge, but if one has served as a judge, the tests

are there and the tests are met. And I think that is an important criterion.

Judge Paez was born and raised in Utah. He attended Brigham Young University. He received his law degree from Boalt Hall. He worked as a staff attorney for California Rural Legal Assistance and the Western Center on Law and Poverty. He served both as acting director of litigation for Legal Aid of Los Angeles. He also has served on the Los Angeles Municipal Court bench from 1981 to 1994, and during this time, he was appointed twice by the chief justice of the California Supreme Court to serve as a member of the California Judicial Council, the policymaking body of the California judiciary, where he supported reforms to improve the efficiency of the courts.

He was elected chair of the Los Angeles County Municipal Court Judges' Association in 1990. This organization was created so the county's 188 municipal court judges could work on issues of common concern. Further, for several years, Judge Paez taught at a

number of judicial education programs sponsored by the California Center for Judicial Education and Research. He was confirmed to the Federal bench as a district court judge in the central area by this committee in July 1994, and then as you know, subsequently nominated to the circuit court.

I think that Judge Paez will bring a history of judicial experience, of legal experience, and of public interest law that is very important to see that the judicial system and that the circuit court is well rounded. I am very proud to support his nomination.

Senator GRASSLEY. Thank you, Senator Feinstein.

We are back on schedule as far as the agenda

is concerned, so that means that we call Judge Graber and Judge Paez. If you would come to the center two chairs there, and before you sit, if you would stand and would each of you please raise your right hand. I would like to swear you in. Do you swear the testimony you shall give in this hearing shall be the truth, the whole

truth and nothing but the truth, so help you God?

Judge PAEZ. I do, so help me God.

Senator GRASSLEY. Please be seated. And as I have indicated before, we would like to give you both opportunities to introduce family and friends and to make an opening statement before we each ask questions of you.

TESTIMONY OF RICHARD A. PAEZ, OF CALIFORNIA, TO BE U.S.

CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Judge PAEZ. Yes, Mr. Chairman, thank you very much for the opportunity to be back here at this committee, and I would like to

take just a few minutes to introduce my wife, Diane Erickson. We are about to celebrate our silver wedding anniversary very soon.

My son, David, right here, and my daughter, Lisa. And I would like to acknowledge my parents. My mother and father were not able to be here with me today. It was a long trip from California. But they are here with me in spirit, along with my sister, who lives in Arizona. She wanted to convey her good sentiments to me. So, with that, I have nothing further to say, Senator.

Senator GRASSLEY. OK.

OK. Then if you could, I would ask you questions, and then go to Senator Feinstein, then to Senator Thurmond, then to Senator Sessions, or if anybody else shows up.

I also might mention that it is common practice not only for

members who are here but members who can't come today to submit questions for answers in writing. And I assume that that is

about a 10-day period of time that you have to answer that. I don't know for sure. But whatever it is, find out and get answers back to us.

Let's see. Yes; that would be one administrative thing that I forgot to mention at the beginning of the hearing. So, that would not

only be for you two, but for all the nominees who are on today's agenda, including Judge Barzilay, who just was at the panel.

Do either of you have-and this would be to both of you-any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that

might come before a Federal judge?

Judge PAEZ. Right.

Senator GRASSLEY. Judge Paez.

Judge PAEZ. Senator Grassley, there is nothing in my personal background or any of my--anything that would prevent me from either enforcing the death penalty of a district court judge or in upholding a death sentence.

Senator GRASSLEY. OK. Judge Paez, in a 1995 speech you made regarding diversity in the judiciary, you took very strong stands in favor of proportional representation on the bench. You repeatedly used population statistics to argue that the judiciary in California was not diversified.

We have seen the EEOC and others use this proportional representation argument to force employers to institute programs

based on race. You have advocated litigation, if necessary, for ethnic groups to reach more diversity.

What is your view on proportional representation as a method of determining discrimination in the workplace?

Judge PAEZ. Well, I don't think that is appropriate, and the remarks that I gave in that speech, I was focusing on the California

judiciary at the time. I had served on the Judicial Council, as Senator Feinstein had noted, and the council had been interested in

looking at the makeup of the California judiciary, and had formed a select committee to study that. I was not on that committee, but I had the benefit of reading their report.

The population in California has changed over the time. It is very diverse. And there was one particular community that I found a particular interest in, and that was a little community in southeast Los Angeles where I actually grew up when my family moved

from Utah to southern California. When I moved there, it was predominantly a white community, but, interestingly, over the past 20

years it has significantly changed. There was a significant shift in population, and it is now predominantly Hispanic.

The question that I was just attempting to look at was to look at the changes in the population, but then look at the institutions that are working in those communities and to raise the question

and to make it--express the view that the judiciary is one institution in our governmental process that ought to be diverse and to

represent all kinds of people with all kinds of experience, both ranging from prosecutors to business lawyers, and just a diverse group, because I think it is very healthy for the judicial process

and for the political process and to gain the respect and the commitment that, I think we all want our population to have with respect to judges and the role of judging and the judicial process.

Senator GRASSLEY. Then, is that a statement of your position on my question as to your view on proportional representation as a method of determining-

Judge PAEZ. I don't think it is appropriate

Senator GRASSLEY. [continuing] Discrimination in the workplace? What?

Judge PAEZ. I don't think it is appropriate. I mean, I think, you know, my understanding-

Senator GRASSLEY. You are saying that my relating this question to your previous writings is not appropriate or-

Judge PAEZ. No, no, no, no.

Senator GRASSLEY. Or it is inappropriate for me to ask this question?

Judge PAEZ. No, no. I am sorry. I am not making myself clear.

Senator GRASSLEY. OK.

Judge PAEZ. The use of proportionality statistics in Title VII or employment litigation, I do not-I have never advocated and I don't think it is appropriate. That is what I meant to say, Senator.

Senator GRASSLEY. Thank you for clearing it up.

Judge PAEZ. I didn't mean to suggest anything otherwise.

Senator GRASSLEY. Now let me go on to another point, Mr. Paez.

You also made the point that "The Latino community has for some time now faced heightened discrimination and hostility which came to a head with the passage of Proposition 187. The proposed anti-civil rights initiative will inflame the issue all over again."

Do you still believe Proposition 187 is an anti-civil rights initiative? And explain your reasoning one way or the other.

Judge PAEZ. Well, let me--I should say a couple of things on that matter. One, I am going to respond to the question, but I would note that that case is still pending in my court. There is a challenge to that case.

Senator GRASSLEY. Well, let me suggest to you, even though I am not a lawyer, I would not expect you to do anything that would violate your impartiality on that case.

Judge PAEZ. One of my colleagues is handling that case, Judge Pfaelzer, and part of it is on appeal to the ninth circuit. But let me just say the comment there was simply that the Latino community in California did not, I think, support that initiative with a great deal of enthusiasm, and it tended to be somewhat divisive.

It was viewed by some segments of the community as being just that. I can't really say too much more about it other than to just note that.

Senator GRASSLEY. So then your answer to the question is that you do believe that Proposition 187 is an anti-civil rights initiative?

Judge PAEZ. No, I didn't say--I don't mean to say that. Not at all. It raised a lot of issues, and they are still being debated today in California.

Senator GRASSLEY. OK. My next question to you is: Since you have argued for proportions representation in other contexts, I have a question on the use of statistics-

Judge PAEZ. Sure.

Senator GRASSLEY. [continuing] On the death penalty. Do you believe that statistics regarding how frequently the death penalty is imposed against one racial group is relevant to whether or not the imposition of the death penalty is proper or constitutional?

Judge PAEZ. I don't think it is proper. I am not sure what the writings are by the Supreme Court on that subject, but I don't really think that it should preclude the use of the death penalty.

Senator GRASSLEY. I think out of courtesy to my colleagues, if I could ask my colleagues, I have two more questions of this panel.

OK.

In the absence of proof of prior-and this would be for you, Judge Paez.

Judge PAEZ. Sure.

Senator GRASSLEY. In the absence of proof of prior racial discrimination, do you think that racial set-asides or racial preferences are constitutional? In other words, do you believe that nonremedial racial conscious government programs are ever constitutional?

Judge PAEZ. Well, the U.S. Supreme Court in the Adarand decision made it abundantly clear-and in another case called Croson

with respect to State governments; Adarand dealt with Federal institutions-made it perfectly clear that any such racial classifications must be subjected to a heightened scrutiny, only justified by a compelling State interest, and the interest had to be narrowly tailored. And when you apply that standard, it is a very tough standard, and I think there is probably very few circumstances, if any, that could ever qualify for that standard. So that is my understanding of the law, and I would follow that and apply that in any case that came along.

Senator GRASSLEY. This would be for both of you. What are your views regarding the initiative process in the ninth circuit? We have seen a number of judicial challenges to specific initiatives. We have even had one ninth circuit panel basically say the voters weren't capable of understanding what they were doing, and so it is important to have some understanding how each of you view the process.

Judge PAEZ. Maybe I should go first, Senator, because I am from California, and-

Senator GRASSLEY. OK.

Judge PAEZ. [continuing] The initiative process in California is a very active one.

The initiative process in California is very, very important to the people of California, very significant to the people of California, and there are frequently a number of initiatives on the California ballot all the time. And I think when you are asked-if a case is brought to you raising issues with respect to an initiative, one must proceed with caution and respect that the vote of the people is presumed constitutional, and you look at it from there and you apply established constitutional principles in evaluating the initiative.

Senator GRASSLEY. OK. I thank each of you for answers to my questions. Would you please stay at the table?

Senator Feinstein?

QUESTIONING BY SENATOR FEINSTEIN

Senator FEINSTEIN. Thank you very much, Senator.

Because Proposition 187 has been raised and I think on this committee probably the value of having judicial review in initiatives,

I just want to point out to you that I opposed 187. Because of it, I almost lost the election. I would oppose it today. Proposition 187 in my analysis would require a teacher in a school, if that teacher suspected that a youngster might be illegally in this country, to report that youngster to the INS. It would also have required a physician treating a youngster, if he or she suspected that youngster may have been in this country illegally, to report that youngster to the INS.

Additionally, even if the youngster was legal but they suspected the parents might not be legal, they would have to report that youngster to the INS. That is my honest belief about the way the proposition would have worked.

Now, I want that proposition to be reviewed by the judiciary. I

want to know whether that is constitutional or not, because that is not my understanding of the United States of America. This is a very big issue, and in California, it was on the ballot in the depths of the recession, when the infrastructure was overloaded. We are the State of many, many immigrants, and I have been, as you know, strongly opposed to illegal immigration. I sit on that subcommittee of this committee. But 187 really raises very major and serious constitutional concerns.

I do not believe in my heart of hearts that people who voted for 187 really understood-it is very complicated; this was legalese-really understood what they were voting for when they voted for

it. So, in my opinion, a judicial review of that initiative in terms of its constitutionality is entirely appropriate.

If I may-and Senator Grassley asked a

death penalty question-I would like to ask a question about Federal sentencing guidelines. I was just present at a swearing-in of

some Federal judges in California while I was home, and I noted some grumbling about the guidelines. So let me ask you both the question.

As you know, Federal judges are subject to a range of Federal sentencing guidelines, and they require specific factual findings for departure from the guidelines. Furthermore, Congress has recently increased the number of offenses subject to mandatory minimum sentences. So I would like to ask each of you: Do you have any reservations about and are you willing to fully, follow Federal sentencing guidelines and to fully implement mandatory minimum sentences where applicable?

Judge PAEZ. Senator Feinstein, during the last 4 years that I

have been a district court judge, I have had the opportunity to

work directly with the sentencing guidelines every week, sometimes every day, and I have had no difficulty in applying the guidelines. In fact, I find them helpful. In many instances, they make

the job, the role of sentencing, it is well-defined and you know what

the parameters are and you know what is expected. And, by the

same token, the defendants know what is expected and what is coming.

I have no problem with the mandatory minimums that are required in certain instances, and I have applied them and I

have

had no difficulty.

Senator FEINSTEIN. Thank you very much, Judge Paez.

Now, since judicial activism has raised its head on this committee and elsewhere in the United States Senate, I want to ask you

a question about it. I define a judicial activist as a judge who doesn't appreciate the inherent limits on judicial authority under the Constitution and who seeks to legislate from the bench.

I would like to ask each of you: What do you understand the inherent limits on judicial authority to be under the Constitution of

the United States?

Judge PAEZ. And, Senator Feinstein, I just wish to assure you

that I have an unbinding respect for the separation of powers and

the role of the legislature, the role of the executive, and the role

of the courts. And I can assure you that I understand that we as

judges are not to legislate. That is the role of the Congress, the role

of the legislature, and it is the role-the responsibility of the executive to enforce those laws.

We are not to be legislating, and I understand that full well. And

in my career both as a State court judge and on the district court,

I have tried very consciously and forthrightly to respect that, and

I will continue to do so.

Senator FEINSTEIN. Thank you very much. And a final question on precedent. If you are confirmed as a Federal judge, at some point you might be faced with applying a Supreme Court or an appellate court precedent with which you do not personally agree.

Would you consider yourself bound by such a precedent?

Judge PAEZ. I share those same views very much, Senator Feinstein, and I would follow precedent unquestionably.

Senator FEINSTEIN. Thank you very much.

Senator GRASSLEY. Senator Thurmond.

QUESTIONING BY SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman.

Justice Graber and Judge Paez, you were present here a few

minutes ago when the question came up about judicial temperament. I presume you take the same position as you heard discussed

a few minutes ago. Do you or not?

Judge PAEZ. Absolutely, Senator. Yes, very much.

Senator THURMOND. Judge Paez, what role do you believe judges

have in developing public policy through case law, when the legislature repeatedly fails to address important matters?

Judge PAEZ. Well, our role as judges is to decide the case that is in front of us, to try and ascertain what the law is, and then to

apply the law to the case, and that is what I have tried to do. I

always-sometimes it takes a lot of effort to figure out what the

law is, what the statute says or what the case law is, but that is

what I-it is to decide the case based upon established precedent

and what the statute says.

Senator THURMOND, Judge Paez, an issue that raises concern is when policymakers make tough decisions and enact laws only to have those laws held unconstitutional by a judge. In October of last year, in *Los Angeles Alliance for Survival v. City of Los Angeles*,

you issued a preliminary injunction holding that a Los Angeles panhandling ordinance violated the free speech provisions of the California Constitution. The question is: Are you concerned about

judges placing unnecessary restraints on policymakers based on expansive constitutional interpretations?

Judge PAEZ. Senator, I have to be careful here because that case is pending in front of me. In fact, on Monday, I just had a status conference with the lawyers that are in the case.

I would just like to go back to what I said earlier. I think you

need to basically apply the presumption that laws are constitutional, but then, nevertheless, when your case is brought to you,

you are called upon to look at the case, to look at the statute or

whatever you are asked to decide and apply existing law. And basically that-I tried to do that in that case, and the

lawyers are basically-just to share a little insight with you, the lawyers told me

that they have appealed that case to the ninth circuit. And that is where it is today.

Senator THURMOND. Judge Paez--and I will ask you the same question, Justice Graber--do you believe that the death penalty should be held unconstitutional?

Judge PAEZ. Senator Thurmond, the U.S. Supreme Court has answered that question quite clearly, and I can assure you that there

is nothing in my background or anything that would in any way cause me to question in any way what the Supreme Court has said about the constitutionality of the death penalty.

Senator THURMOND. So you would not hesitate to uphold a death penalty sentence?

Judge PAEZ. No, sir.

Senator THURMOND. Those are all the questions I have. I wish you both well.

Judge PAEZ. Thank you, Senator.

Senator GRASSLEY. Senator Sessions.

QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. Thank you, Mr. Chairman.

Frankly, I think both of you have records and friends that indicate that you are good people and have good legal skills, and I respect that. I have no quarrel with your integrity or legal ability.

And really, I am not sure how I feel about these nominations except to say that the court of appeals is one step below the U.S. Supreme Court. It sets a policy and a tone of law for an entire circuit.

Obviously the biggest circuit in the country is the ninth circuit, and most of you know-it is not a very well-kept secret-that the ninth circuit is having an awful lot of trouble with the U.S. Supreme Court.

For example, I think last year 27 out of the 28 cases reviewed by the U.S. Supreme Court were reversed by the U.S. Supreme Court, I believe 13 out of 14 the year before, or something like that and over the years that has been a pattern since I was a Federal prosecutor. And, in fact, many prosecutors around the country or judges wouldn't even consider opinions on discovery matters and so forth out of the ninth circuit because they were out of step with the current state of the law in the other circuits.

And so I guess that is causing me to give some thought to your philosophy and the importance of correcting and getting the ninth circuit back into the right sync with the rest of the law in America.

I would like to ask you a couple of questions. On the death penalty, both of you have correctly stated that you believe the Supreme

Court has made itself quite clear on that subject. But for a number of years, at least two members of the Supreme Court dissented on that. They are no longer on the Court, but they held to the view that the death penalty was unconstitutional.

Judge Paez, how would you answer that question? Have you had occasion to comment publicly, first, on the position of Justice Brennan and I believe Justice Marshall on the death penalty?

Judge PAEZ. No, Senator, I have never had the opportunity to express any kind of public view on that.

Senator SESSIONS. Have you filed a brief at any time asserting that?

Judge PAEZ. No, I have not. Never.

Senator SESSIONS. And would you give your opinion as to the validity of their view on the death penalty?

Judge PAEZ. Well, actually, it has been a very long time since I have read any of those earlier-their decisions in-

Senator SESSIONS. Fundamentally, they found it to be cruel and unusual punishment.

Judge PAEZ. But I think if you look at the Constitution, I think it is our fifth amendment which says that no life or liberty can be taken without due process of law, which seems to suggest there that the death penalty was recognized as in the Constitution. So

I wouldn't want to speculate how I would have gone about analyzing all of that, but it is now years ago that all this has taken place, but I think the Court has made it quite clear that it is constitutional.

Senator SESSIONS. Well, I think in a way that was the high-water mark of judicial activism because you are correct, I think

there are about four references in the Constitution adopted by the people of this country in 1789 that referenced a death penalty. And

for a judge sitting today to say the Constitution, which clearly contemplated a death penalty, makes a death penalty-

you know, it violates that Constitution, would be an abuse of power to me, and to me it is not a matter that good people could even disagree on. I was astounded that they openly stated that under the current standards of high ethical conduct or evolving standards of decency we now declare it unconstitutional.

So that is just an issue to me. I think sometimes we got caught a few years ago in the idea of using the law to force social change that the public may not agree with. And I have some doubts about that.

With regard to the panhandling statute, it troubles me that you have, in fact, enjoined enforcement of it. That was a politically hot issue a few years ago, 10 to 15 years ago, among civil libertarians opposing panhandling laws. I never thought the opposition was sound, but now we know, for example, in New York City that Mayor Giuliani has cracked down on street crime and panhandling and minor crimes and subway violations and that kind of thing. It has helped reduce crime overall. And these kinds of things can make life in a city unlivable.

Do you understand-

Judge PAEZ. Oh, absolutely, Senator.

Senator SESSIONS. Would you comment on your willingness to overrule the decision of the city of Los Angeles with regard to that statute?

Judge PAEZ. I would just say all I did was make an issue of preliminary injunction. But, you know, I too-I live in the downtown

area of Los Angeles, close to downtown Los Angeles, and, you know, as a member of the public and as a member of the population in the downtown area, I am aware of the problems you articulate and the problems that the mayor, my mayor, Mayor Riordan has articulated with respect to these very issues that Mayor

Giuliani has looked at in New York. And I appreciate very much everything that they say, and if you look at the order that was filed in that case, it tries to follow what I believe the ninth circuit was saying and set out there completely.

But, you know, I am involved in the community and I am sensitive to the things that you are saying.

Senator SESSIONS. My time is up. I might like another round.

Senator GRASSLEY. I am done asking questions, so if you have another question or-

Senator SESSIONS. Well, I would kind of like to follow up on some of your-

Senator GRASSLEY. The only thing I want to do is get done with the other panel at 4 o'clock.

Senator SESSIONS. Fair enough.

With regard to the speech that Senator Grassley asked you about originally, you gave that speech as a sitting Federal judge.

Judge PAEZ. I had already become a member-I was already a district court judge at the time I gave that speech. I was invited to go back to Boalt where I graduated from law school to speak in a speech that was given recognizing and honoring a good friend of mine who was in law school with me and became a State court judge and was killed in a tragic accident. And they created this lecture for his-to keep his memory alive, and asked me to speak on

issues that would be of interest, would sort of follow in his legacy.

Senator SESSIONS. But you did take that opportunity to criticize

an initiative of the people of California, which is-how do you feel about a Federal judge taking public positions on political issues of that-

Judge PAEZ. Well, I don't--well, we shouldn't, and I wasn't trying to take a political position. We were bound by certain ethics. Nonetheless, as I said a minute ago, we are-we have a life outside of

our role as a judge as well, and it was an-I was trying to address a particular broad issue, and so I made those remarks.

Senator SESSIONS. And Senator Grassley asked about Proposition

187. I think there may be some confusion there, and I would like

to see if I can clarify. In your speech, you said, "The Latino community has for some time now faced heightened discrimination and

hostility which -came to a head with the passage of Proposition 187." Now, that is the proposition that-

Judge PAEZ. Well, that's-

Senator SESSIONS. [continuing] Senator Feinstein was talking about. Then you went on, and I will quote from you.

Judge PAEZ. Sure.

Senator SESSIONS. "The proposed anti-civil rights initiative will inflame the issue all over again without contributing to any serious discussion of our differences and similarities or ways to ensure equal opportunities for all."

The question I would have is, first, you are referring there to Proposition 209, the California civil rights initiative, were you not?

Judge PAEZ. I think so, but at that time, I don't think it was on the ballot or it was in-it was pending or it was contemplated.

Senator SESSIONS. You said "the proposed" civil rights.

Judge PAEZ. I think it was proposed.

Senator SESSIONS. And you referred to it as the "anti-civil rights initiative."

Judge PAEZ. Perhaps I did. I don't recall.

Senator SESSIONS. This is in your written remarks. I guess I am reading right here. "The proposed anti-civil rights initiative."

Now, tell me how it is that Proposition 209, which basically mirrors the 14th amendment, is an anti-civil rights initiative.

Judge PAEZ. I am not sure if at the time the exact proposal was identical to what ultimately made it on the ballot, because there were a number of-it was--I remember just reading in the papers there was a lot of debate going on as to how it should actually be formulated.

But I can just assure you, Senator, that, you know, the ninth circuit has said that that statute is constitutional and there is no

question about it. It is constitutional, period.

Senator SESSIONS. They say there was no doubt it was constitutional.

Judge PAEZ. That is absolutely right. They did.

Senator SESSIONS. Although a judge had entertained-a sitting district judge-

Judge PAEZ. That is correct.

Senator SESSIONS. [continuing] Had entered an injunction, as you did, to stop its enforcement.

Judge PAEZ. Right. That is correct.

Senator SESSIONS. Do you understand how that could frustrate the people of California who felt like they were enacting a proper law and here a-not you, but this other district judge-

Judge PAEZ. Right.

Senator SESSIONS. [continuing] Had just stopped it and they had to then go to the appeals court and-to get it reversed.

Judge PAEZ. Correct.

Senator SESSIONS. Do you understand the sensitivity of that?

Judge PAEZ. I absolutely do, Senator, because, I think as I was saying earlier, the initiative process in California is historically very important in California. And it is well-grained into the democratic process in California, and I think you do have to approach

these citizens' initiatives on the basis that they are assumed to be constitutional.

Senator SESSIONS. Do you believe they-

Judge PAEZ. You approach it very cautiously.

Senator SESSIONS. Do you believe they should be given any more scrutiny than a legislative act by the State legislature?

Judge PAEZ. No; I don't think that-my understanding right now on that is, I don't think the Supreme Court has said that citizens' initiatives are to be given greater scrutiny just because they are a citizen initiative, but I think you approach the analysis as you would any State statute or any statute that is attempting to be challenged for an unconstitutional basis.

Senator SESSIONS. Well, some have-

Judge PAEZ. But I think-but as I said-I'm sorry. I think I just wanted to reemphasize that you approach those matters very cautiously no matter if it is a legislative-passed statute or if it is a citizen-driven initiative. And I am sensitive to that.

Senator SESSIONS. Well, I guess my only point, do you believe that an initiative passed by the people deserves any more-is any more suspect than legislation passed by a legislature?

Judge PAEZ. No; I don't, Senator. Not at all.

Senator SESSIONS. Some have adhered to that view.

I want to pursue a little bit again-and I think this was a prepared address to a law school.

Judge PAEZ. Sure.

Senator SESSIONS. And you referred to the just-passed California civil rights initiative as "the anti-civil rights initiative." And I would like for you to explain for us what it is that made you characterize it in that fashion.

Judge PAEZ. I am not sure exactly what--how I wrote those remarks or why I said those remarks at the time, but let me just say

this: As I recall, these issues, sometimes the citizens' initiatives do--tend to be somewhat divisive throughout the populace in California. And I think that particular initiative which followed on the

heels of 187 that Senator Feinstein just elaborated on tended to be a little bit controversial throughout the population. And I think in some communities it was viewed as another-raising issues that people didn't really want to deal about, and it tended to be controversial.

A lot of people were disappointed and upset with the initiative, and I think I am just reflecting there that those matters can be disruptive, but, again-

Senator SESSIONS. Well, you didn't say it was disruptive. You didn't say it was a disruptive issue. You said it was an anti-civil rights. Can you tell me how that initiative-where you would declare it to be anti-civil rights?

Judge PAEZ. I don't think I-well, it's not anti-civil rights because it sought to ensure equal opportunity and to make that clear

and to basically eliminate government-sponsored--State-sponsored affirmative action programs.

Senator SESSIONS. Well, that is the-I think that is the point to

me. I am troubled by the idea that if you don't agree with my definition of civil rights, you are anti-civil rights. I think the fourteenth

amendment, the Supreme Court in the Adarand case, the people of California in this case, say very clearly they believe everyone should be treated equally and fairly, but they do not believe that people should be given advantage-

Judge PAEZ. Right.

Senator SESSIONS. [continuing] Because of their background, the color of their skin, or their race. And I think that is pro-civil rights. And I think that was the motive behind the civil rights initiative, and I just want to see if you think that because it eliminated quotas and preferences that you would consider that to be anti-civil rights.

Judge PAEZ. No; I don't, Senator, and I regret that those words--that I used those words, because I think mainly what I was trying

to reflect was a frustration and concern because it was--it followed on the heels of 187, which raised a lot of debate and a lot of concern. And that is all I think I was really trying to reflect there.

I think--as I said earlier, I think Adarand has made it quite clear, and Croson, which was a case following that that applies to State officials, that any attempt to adopt classifications based on race are inherently suspect, and they can only be justified by a compelling State interest. And I recognize that in Adarand that Justice Scalia said there can be no compelling State--there can be no justification whatsoever for any such classification. So, I am sensitive to those issues, and I wish to assure you that I am. Those propositions--and there have been others in the past that have raised other issues, and I am sure in the future there will be more from all sides and all walks--raising all kinds of issues.

Senator SESSIONS. Yes. Well, let me ask one more thing--

Senator GRASSLEY. Senator Sessions.

Senator SESSIONS. Oh, I am sorry.

Senator GRASSLEY. We do have Senator Leahy.

Senator LEAHY. If you have only one more question, go ahead.

Senator SESSIONS. Well, yes. I think that is all I would have, and that would be--when you evaluate--you criticized the disparity, racial disparity of the makeup of the bench in California.

Judge PAEZ. Sure.

Senator SESSIONS. And it is something, I think, that is worth analyzing and important. It ought to be studied, and we ought to talk about it.

But if you decide what kind of--what the makeup should be, would you agree or not agree that the makeup should be compatible with the percentage of minorities admitted to the bar and who

have practiced for, say, 10 years, the normal time maybe they expect, as compared to the overall percentage of--

Judge PAEZ. Right, it--
Senator SESSIONS. [continuing] That group in the population or not?

Judge PAEZ. If you are going to try and do any kind of proportional analysis, that probably would be a more appropriate analysis. But I'm not even sure that that is even appropriate itself, because basically, I think, you just want to reach out and to make

sure that there is some representation on the courts with respect to all people from all kinds of different--with all kinds of different backgrounds, prosecutors, defenders, women. It should be reach out. And I don't--I'm not suggesting that there should be any one

analysis. That certainly is good-if you are going to do that, that is certainly a- there is a lot of justification-
Senator SESSIONS. Well, I notice in your speech you didn't make any reference to percentage of lawyers in the population-
Judge PAEZ. No. I'm not sure-I don't think at the time I had those statistics.

Senator SESSIONS. Your criticism was of the overall population. I yield to the distinguished minority.

Senator GRASSLEY. Senator Leahy.

QUESTIONING BY SENATOR LEAHY

Senator LEAHY. Judge, I would ask you as a member of the district court, no matter what feelings you might have on civil rights

or anything else, you would be bound by the decisions of the ninth circuit, would you not?

Judge PAEZ. Yes; absolutely, Senator.

Senator LEAHY. And as a member of the ninth circuit, you would be bound by decisions of the Supreme Court. Is that correct?

Judge PAEZ. That is correct. Absolutely.

Senator LEAHY. Do you have any question in your mind that no matter how you may feel about what the legislature might or might not have done on some of these civil rights issues, do you have any question in your mind that you would be able to follow both as a district judge the stare decisis of the ninth circuit and as a ninth circuit judge the stare decisis of the Supreme Court?

Judge PAEZ. Absolutely no, Senator. I can assure you, as I have tried to do the other Senators, that I will follow the law of the ninth circuit and the law of the Supreme Court. That is my-I am duty-bound to do that, and I respect that very much.

Senator LEAHY. In fact, Judge, I think one of the reasons why you have the highest rating the American Bar Association can give and the strong support of the California Senators and the very strong support of numerous people across the political spectrum in California is, frankly, because you have done that. You have followed the law and followed it very carefully.

I know that some have talked- about your service in legal aid. As far as I am concerned, lawyers who are willing to take time, whether in pro bono work or legal aid or areas like this, where, frankly,

talented lawyers like yourself often do not spend the time, I think that is a matter you should be commended for.

I know I spent nearly 9 years as a prosecutor, and there were times when the public defenders would have me tied up in a knot, and I might get a little bit annoyed at trying to figure out how I was going to get out of that. But every day I said thank God they are there, because somebody-and especially the better ones, because somebody has to be there making sure that the system

works. You know and I know-and you have certainly seen litigants before you where one side is unable to get real counsel because of poverty or status in the community or whatever. And you know, as I do, that that is a terrible case to have to try to preside over. Am I not correct?

Judge PAEZ. You are absolutely correct, Senator. The law-sometimes in State court, though the issues were simple for me, perhaps, just coming into the court, coming into the municipal court, it is a very intimidating experience. The law is complicated whether it be a simple consumer dispute, an unlawful detainer case, or,

for that matter, a complex insurance dispute over coverage.

I learned to appreciate that very much when I worked as a lawyer. I saw that when I was a State court judge, and I see

it again

in the Federal court, because the Federal court-you come into a Federal court, and it is a very awesome experience. And for somebody who is not schooled in the law, a lawyer who is not trained

in Federal practice, it can be very difficult. And I have always been tried-have been sensitive to that, and as a judge, I have always tried to display courtesy and just take the time with both pro per litigants and new lawyers to assist them and to train them and to see that they grow and develop.

And I tried to do that as a judge with new judges when I was a State court judge as well. So I appreciate that.

Senator LEAHY. Well, Judge, that is certainly the reputation you have, certainly the reputation that those who have written to me on your behalf. And as I said before, some of those people go across the political spectrum and certainly go across the spectrum of plaintiff, to defendant, lawyers, and on. Your nomination has been here now for 2 years. I would hope that all members would feel that you have answered the questions and we could have a vote up or down on you, which I think is what you would like. And, frankly, Mr. Chairman, I predict that if we do have a vote up or down

on the floor, it will be overwhelmingly for confirmation.

Senator GRASSLEY. Thank you, Senator Leahy.

I had made the point earlier. You might get some answers to question--or get questions that you should submit answers in writing, and we would like to have those back by the close of business

Monday.

Judge PAEZ. Thank you, Senator.

Senator GRASSLEY. That is what the chairman's staff has told me is the deadline.

Senator GRASSLEY. You have been very patient with us and we thank you very much.

Judge PAEZ. Thank you, Senator.

ROSEMARY POOLER
THURSDAY, MAY 14, 1998
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:44 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Ashcroft, Abraham, and Leahy.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. We are happy to begin here today, and I apologize to my colleagues for being a little bit late. I have been under

as much pressure, I think, as maybe all of you have been, and it has been a very tough day. I understand we are going to have a vote at 3 o'clock, so I want to make sure I can get all my colleagues taken care of before then.

So we will begin in this order. As I understand, it is pretty much agreed to. We will start with Senator Levin, then Senator Abraham, Senator Moynihan if he is here, Senator D'Amato, Senator

Bond, Congressman Clay, and Congresswoman Norton, then Congressman Upton. We are happy to welcome you Congress people

over here today. And then there is Congresswoman Kilpatrick here.

Is that right? She is not here? Well, let's start in that order, anyway, and we will start with you, Carl.

Senator LEAHY. Mr. Chairman.

Chairman HATCH. Senator Leahy.

Senator LEAHY. Mr. Chairman, I will simply put in the record my statement. I am glad to see that we have two nominees here from the second circuit. We have others pending, awaiting votes on the floor, and I would urge your and the Senate leadership's help in moving them quickly. Judge Winter has declared a judicial emergency in the second circuit. I watch this with some attention, of

course, because it is my circuit.

All of the Senators, the six Senators from the States representing the second circuit have written letters to the majority leader to move forward with the judges. The first one is Sonia Sotomayor whom I spoke about yesterday on the floor. The other is Chester Straub. Now we will have Rosemary Pooler and Robert Sack, who were nominated several months ago on November 6, 1997.

So I would hope these nominations might move quickly, and I know you will try to cooperate, Mr. Chairman. But we are getting into a very, very difficult situation in the second circuit.

Chairman HATCH. Thank you, Senator Leahy.

If we could have all five nominees come forward: Rosemary S. Pooler, Robert D. Sack, Victoria A. Roberts, Richard W. Roberts, and Ronnie L. White. If you will all stand, please take the oath. Do you swear the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge POOLER. I do.

Chairman HATCH. Thank you. Please be seated.

I notice we have a vote on, so why don't I ask you to go vote and then come back, and I will start. Then I will go vote, and you take

over.

Senator Leahy is going to go vote, and then he is going to come back until I get back. Then he has another committee hearing, but he is going to try and accommodate us so that we don't have to have a big gap or delay here.

Senator LEAHY. I do want to note on the record, unless there is some extraordinary thing that comes out of this hearing I am not expecting-I have read the records of each one of these nominees, Mr. Chairman, and I intend to be very supportive of each of them. At least one I have known for some time. But I am going to be very supportive of them.

Thank you.

Chairman HATCH. Thank you, Senator.

In the order that I called you as witnesses-Ms. Pooler, Mr. Sack, Ms. Roberts, Mr. Roberts, and Mr. White--do any of you have any comments you would care to make? And you might want to introduce your families and guests who are with you, or friends.

TESTIMONY OF ROSEMARY S. POOLER, OF NEW YORK, TO BE U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT

Judge POOLER. I would like to do that, Mr. Chairman. I am Rosemary Pooler. Thank you for holding this hearing.

My father is not here. He is 92 1/2

and thought that he would save

his energy. I am disappointed my two children are on the west coast, a daughter taking final exams at Oregon State University, and a son in California who couldn't get here.

My husband is here, William Pooler.

Chairman HATCH. Where are you seated, Mr. Pooler? Oh, I see.

Great to have you here.

Judge POOLER. My cousin, Susan Horn; my law clerk, Tania Anderson. Some very dear friends, some of a lifetime, practically: Tina

Stoll and Peter Sherman, Alan and Helene Ward; Layne Yranian, who used to be in the Northern District of New York, is now living and working here in Washington; Stephanie Nagel, another former Syracusan who is here.

Thank you for the opportunity.

Chairman HATCH. Glad to have you here.

Good to have you here.

Well, we are happy to welcome all of you here, the family members and friends. It is always nice to see you and nice to have you

in these hearings. These are important hearings. This is one of the most important things that the Judiciary Committee does.

I have some questions for you. Maybe we can start with the two circuit court nominees first.

Are both of you committed to follow Supreme Court precedent and the rulings of the Federal Circuit Court of Appeals for your district, the Supreme Court in your particular case, and giving the rulings of the Supreme Court full force and effect even if you personally disagree with such precedent or rulings?

Judge POOLER. I am absolutely so committed, Mr. Chairman.

Chairman HATCH. What would you do if you believed the Supreme Court had seriously erred in a decision? Would you nevertheless apply that decision or your own best judgment on the merits?

Judge POOLER. As would I, Mr. Chairman. I would follow the Supreme Court precedent.

Chairman HATCH. Well, take, for example, the Supreme Court's recent decision in City of Boerne v. Flores where the Court struck

down the Religious Freedom Restoration Act. A lot of us feel like they made a terrific mistake there.

The chairman feels like they made a-

[Laughter.]

How about yours, Ms. Pooler?

Judge POOLER. I also would be required to follow that decision and know that the Congress has many times tried to draft legislation yet again that sometimes meets the constitutional challenge.

Chairman HATCH. This really burns me up that you are not agreeing with me.

[Laughter.]

The fact is it is up to us to draft legislation that is constitutionally permissible.

Under what circumstances do you believe it appropriate to declare a law unconstitutional?

Judge POOLER. Well, first let me state that any enacted legislation has the presumption of constitutionality so that is not ever a

casual ruling. I would look at precedent-I am sorry. I would look at precedent seeking to find that the statute or similar language had been declared constitutional, and it would be a grave decision to find that an enacted statute was unconstitutional. I have never had to do that as a district court judge. Although I have been invited many times by many of my pro se plaintiffs to do that, I have

declined the invitation whenever it has been offered to me.

Chairman HATCH. Well, thank you.

Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a Federal judge?

Judge POOLER. Mr. Chairman, there is nothing in my constellation of personal beliefs that would keep me from enforcing the law

as promulgated by the Supreme Court and my circuit.

Chairman HATCH. OK.

Let me ask you, please state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness under the equal protection clause of the

14th amendment and Federal civil rights laws of the use of race-, gender-, or national origin-based preferences in such areas as employment decisions-that is, hiring, promotion, or layoffs--college admissions and scholarships awards, and the awarding of government contracts. What would be your best independent legal judgment with regard to their lawfulness under the equal protection clause of the 14th amendment?

Judge POOLER. I agree. I am prepared to follow the precedent of Adarand. I would also look for a compelling state interest, and, of course, what that decision did is apply to the Federal Government rules that had already been applied to the States, and that is entirely appropriate.

Chairman HATCH. OK. I was hoping that Senator Leahy would be back.

I think we will just temporarily recess until he gets back. If he has any questions, then he will ask those, and then I will be back in a few minutes. OK? We will take a few minutes.

[Recess from 3:18 p.m. to 3:35 p.m.]

QUESTIONING BY SENATOR ASHCROFT

Senator ASHCROFT. [presiding] If the committee would come back to order. The Senator who is the chairman, Senator Hatch, has welcomed me to begin with an opportunity to extend and continue the committee meeting. It is my understanding that he intends to return, but we are in the midst of what could be a series of votes, and so I think it is all in our best interest if we have an opportunity just to proceed. So I would be grateful for this opportunity,

and I thank the nominees for having remained and for being available.

Ms. Pooler, are there any rights that you think are in the Constitution which haven't yet been expressed which you await an opportunity, say, ruling as a judge to bring into existence, like the right to privacy? Or do you think that the rights that exist in the Constitution have been discovered and have been properly expressed?

Judge POOLER. I don't think there are any hidden rights. I think that we know what the Constitution says, and I don't think there are any rights waiting to pop out. I certainly have no intention of finding new rights.

Senator ASHCROFT. Well, the right to privacy sort of popped out.

Judge POOLER. It sort of evolved, perhaps.

Senator ASHCROFT. Do you believe that the Constitution is a document that is subject to evolution?

Judge POOLER. I think that we must look to the intent of the Framers. Facts change, but the words don't change. I think the words are there.

Senator ASHCROFT. I see that the chairman has come back, and I hope that I was properly informed that you would not be offended were I to go ahead with some questions, Mr. Chairman.

Chairman HATCH. No, no.

Senator ASHCROFT. I am glad to see you reappear, and I thank you.

Chairman HATCH. Thank you, Senator Ashcroft.

I am sure Senator Ashcroft was asking many interesting questions. Let me just make a caution to you. As you know, we have

had a very difficult time through the years, whoever has been in charge of this committee, putting judges through the committee and getting them confirmed. We consider this probably one of the most important functions of the whole Congress because you people, once you get on the bench, you are there for life and, frankly,

without any real obligation to the taxpayers or anybody else, other than your own personal moral and ethical standards.

It is my opinion that the judiciary has been the branch of government more than any other that has saved the Constitution for

these 200-plus years, and the reason they have is because they have literally upheld the Constitution for the most part, even though there are some notable examples that all of us could find fault with.

But this business of activism versus nonactivism is a very important issue to many of us here. I condemn activism, whether it

comes from the left or from the right, or anywhere else. It is not right for judges to substitute their own policy preferences for what the law really is. It is not right for judges to ignore precedent of the higher courts. It is not right for judges to just act as super legislators from the bench just because you have these lifetime appointments.

And if all judges did this, it wouldn't be long until the Constitution wouldn't be worth the paper it is written on. And the prime

example of judicial activism in this country, in my opinion, is the Ninth Circuit Court of Appeals where we have judges who could not care less what the law says. Their own judgments are more important than the law.

Sometimes the laws are wrong. Sometimes Congress gets it wrong. But unless you have a really good constitutional reason for overturning that, the best way to write that opinion is we don't

agree with the law that has been written but it is the law, and help us to know why you don't agree and maybe we will change it. But to just go and substitute your own ideas for the elected representatives of the country who have to stand for re-election have done is

really immoral and it really diminishes the role of Federal judges.

Frankly, that is why the Ninth Circuit Court of Appeals is reversed virtually every time they decide a case. And there are notable conservative activist decisions that we could point out. I happen to think that the Bourne case is one of the most notable conservative activist decisions. It seems awfully odd to me that the first-mentioned freedom in the Bill of Rights, the freedom of religion, cannot rise to the dignity that the Religious Freedom Restoration Act said it should rise to. And, frankly, I will never quite understand that decision.

On the other hand, it still is applicable to Federal issues. But I think it should have been applicable across the board.

So I caution you, as you go on the bench—in fact, we are counting on you not being activists, not being people who are radical

judges who ignore the law just because you feel you know more about it than Members of Congress. Maybe you do, but that is the way our system works. And I don't think in most cases you do. But even if you do, that is still our system. You are not to make the laws. You are to interpret the laws that are made by those of us who have to stand for re-election. And if we don't do it right, we are going to get thrown out, and we all know it.

So it is important for you to understand that, and if you don't do that, then you demean and undermine not only the Constitution but our courts. And then it makes it even more difficult to get people through this committee.

It has always been difficult, so don't think it has just suddenly happened since the Republicans have taken over. You should have seen what we went through when the Democrats controlled this committee.

To make a long story short, I am on the side of the judges. I really believe that the judiciary has saved this country and saved the

Constitution, and I would challenge each of you to be part of that saving of the Constitution rather than undermining of the Constitution. I think it is very important for you.

I don't mean to lecture you, but I—yes, I did. I meant to lecture you for a few minutes.

[Laughter.]

It may be the last time I will be able to lecture you, but you never know. Every once in a while I get invited over to the Supreme Court, and you ought to hear what I tell them. Of course, they tell me, too.

But I don't mince any words when around them. I have had a major role in eight of the nine of them, and I know them all very, very well. And I don't mince any words when I am near them, and I respect all nine of them very, very much. And you should, too.

Well, we are going to try to get you through as soon as we can.

We know the second circuit in particular needs you both. We believe the other districts where you folks are going to have the opportunity need you as well. So we will do the very best to get you

through. I personally will be devoted to that, as I think you have seen through the intervening years as I have been chairman, and I just want to compliment each of you. You are very good people and very nice people, and I appreciate having you here and being able to meet with you and being able to go through this very important process.

I haven't asked you many tough questions. But that is not the purpose, either. I think the purpose is to just get your commitment

to really live up to the rule of judging and the moral and ethical positions that judges really ought to live up to as you take these very, very important positions. I think they are the closest positions to godhood in this life. And having come from Utah, where

we had Willis Ritter, who thought he was God-and so did everybody else, as a matter of fact.

[Laughter.]

Who literally was a very brilliant man, but a very poor judge because he allowed his own biases to come in all the time. And he

was a friend of mine. I always did very well in his courtroom, and I always liked him. But the fact is he was a poor judge in the sense that he allowed his own personal predilections to always take precedent to whatever the law was. And sometimes his personal predilections were based upon bias, and you can't let that happen. No matter how much you might despise somebody, if they are right you have just got to swallow it and say the law helps them. And no matter how much you like somebody, if they are wrong you should not be upholding their position. You should be doing what is right. And if you do that, then this system of government will last another 200 years and it will be you people who will have helped to do that.

So I am going to do my best to get you all through, and with that, I think we will recess and hopefully have you all on the next markup, which should be next Thursday. So I want to thank each of you for being willing to serve. I know it is a sacrifice in many respects. On the other hand, it is a terrific opportunity to do an awful lot of good public service, and I am counting on each of you to be the best you could be.

Thanks so much.

Judge POOLER. Thank you, Mr. Chairman.

Chairman HATCH. We will adjourn until further notice.

JOHNNIE RAWLINSON
THURSDAY, JUNE 15, 2000

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 4:27 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Charles E. Grassley, presiding.

Also present: Senator Leahy.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. It is a little bit early, but I would like to get the meeting started since we have a member here to participate and move things along, because the time to do everything we have to do is mighty short.

I am Senator Chuck Grassley. I am a member of the Judiciary Committee. Today the Judiciary Committee is holding its sixth nomination hearing of the second session of the 106th Congress. At this hearing we will consider the nomination of five individuals who have been nominated by the President to be Federal judges.

We will have two panels of witnesses this afternoon. The first panel will consist of the sponsors of the nominees, who will give brief statements on behalf of their nominees. The second panel will consist of Circuit Court Nominee Johnnie B. Rawlinson, of Nevada, who has been nominated for the seat on the U.S. Circuit Court of Appeals for the Ninth Circuit, and also consists of four district court nominees: John W. Darrah, to be U.S. District Judge for the Northern District of Illinois; Paul C. Huck, to be U.S. District Judge for the Southern District of Florida; Joan Humphrey Lefkow, to be U.S. District Judge for the Northern District of Illinois; and George Z. Singal, to be U.S. District Judge for the District of Maine.

Before we turn to the panels, I guess what I will normally do now, since there is not a ranking minority member here to make a statement, we will probably interrupt somewhere in the panel for anybody that comes along to make a statement. But I would suggest that, as I indicated in my opening remarks, the necessity of

kind of expediting this process because there is a leadership meeting on the bankruptcy bill at 5:30 p.m., and I have to be there because of my sponsorship of that and working with Senator Torricelli, another member of this committee, to get a bipartisan bill passed.

I would like to start with Senator Reid at this point.

STATEMENT OF HON. HARRY REID, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator REID. Senator Grassley, thank you very much. I know how busy you are and I know how difficult it has been for Senator Lott to get this hearing convened. I extend my appreciation to Chairman Hatch, all members of this committee, particularly Senator Leahy, for holding this hearing so that we can report out some judges. I also have to attend that same meeting as you.

Mr. Chairman, it is really an honor and a privilege for me to introduce to this committee a woman by the name of Johnnie

Rawlinson. She has been an outstanding judge in the United States

District Court for the District of Nevada for the past 3 years, and has served with distinction.

I am proud to report to this committee she has the unwavering support of the chief judge, Judge Howard McKibben, who, by the way, is a Reagan appointee. She has the unqualified support of Phil Pro, also a Reagan appointee, Lloyd George, senior judge, also a Reagan appointee, as well as the other judges who sit on the Federal bench in Nevada. Furthermore, in addition to being an outstanding judge, Johnnie Rawlinson is an outstanding person.

On the way over here, Mr. Chairman, I saw John Ashcroft. He was speaking on the floor. I said to him, I am sorry you can't be here because, as excited as Johnnie is about this opportunity she has to be elevated to an appellate judge, she was more excited this week when she learned that her daughter had been accepted to the University of St. Louis Medical School. This is the kind of a woman that she is. She is family-oriented. She has three children: Monica, Tracy, and David. She also enjoys the total support of her husband, Dwight, who is retired from the United States military.

I have a full statement going into greater detail regarding her academic qualifications and her involvement in the community. I know, Mr. Chairman, that you are in a tremendous hurry, and so I want to be as quick and to the point as I can. I want you to know that in your experience as one of the ranking members of the Judiciary Committee and one of the senior members in the entire Senate, you have had many witnesses appear before you, hundreds and hundreds of witnesses in various settings. But you will never find anyone that is a better person than Johnnie Rawlinson. She is moderate in her views, she has a great academic background, and she would never do anything to disgrace the court. I think this committee would be well served to move this matter to the floor as quickly as possible.

Thank you.

Senator GRASSLEY. I think I would like to call on Senator Bryan so we stay with the same State at this particular point. So if it doesn't upset anybody, I would go to Senator Bryan.

STATEMENT OF HON. RICHARD H. BRYAN, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator BRYAN. Mr. Chairman, the last thing I would want to occur with you presiding is for somebody to be upset because I was recognized next. Therefore, I will simply associate myself with the comments of my senior colleague.

Our nominee has a distinguished record prior to her appointment and confirmation to the district court bench. She has served with distinction in her new capacity. She would provide balance and, in my judgment, a superb choice to serve on the Ninth Circuit Court of Appeals.

I have known her for many years. She enjoys the respect of the bar, of the community, and litigants who have been privileged to appear before her. I would urge her confirmation, and in the interest of time, may I request unanimous consent that my statement

be made a part of the record?

Senator GRASSLEY. Thank you.

Senator Reid and Senator Bryan, I didn't respond when Senator Reid asked that the statement in its entirety be put in the record, so at this point, let me say to all the members that that will be just done automatically unless you indicate otherwise.

Well, then, I would ask that the nominees come forth, all of you, and obviously, I thank all of our members and sponsors for their participation.

I will just, I guess, ask you to stand. Would you raise your hand and I would give the oath. Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge RAWLINSON. I do.

Senator LEAHY. Trust me, Mr. Chairman, they all know what it is like to give oaths.

Senator GRASSLEY. OK, yes. I also think it is a little ridiculous, as far as you folks have come, that we question your integrity, but I guess that is part of the process.

At this point, then, starting with each of you from left to right, before I ask you to give a statement, I would like to have each of you introduce to the committee any family or friends that you would like to have who are obviously here because they are proud of the promotion and advancement that you have been given in your profession.

Judge Rawlinson.

TESTIMONY OF JOHNNIE B. RAWLINSON, OF NEVADA, TO BE
U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Judge RAWLINSON. Thank you, Mr. Chairman. I would like to introduce my husband of 24 years, Dwight, who has come with me today.

Senator GRASSLEY. Thank you, Dwight.

The first questions are going to be to all the nominees, and they will be the same questions, so I will ask it once-I will be glad to repeat it if it needs to be repeated-and ask you from left to right to give your response for the record.

The Supreme Court binds lower courts, and the precedents of circuit courts are binding on district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect even if you personally disagree with such precedents? For you, that is going to be the Supreme Court. For the rest, it will be the circuit court and the Supreme Court.

Judge Rawlinson.

Judge RAWLINSON. Mr. Chairman, as a district court judge, I have committed myself to following binding precedent, and I will continue to do so if I am fortunate enough to be confirmed as an appellate court judge.

Senator GRASSLEY. OK; again, to each of you, you have stated that, if confirmed, you would be bound by Supreme Court precedent and the precedent of your respective circuit court of appeals.

There may be times, however, when you will be faced with cases of first impression. What principles will guide you or what methods will you employ in deciding cases of first impression? Judge Rawlinson?

Judge RAWLINSON. Mr. Chairman, if the case involves a statute and the language of the statute is clear, I will, of course, construe the statute in accordance with this language. If the language is ambiguous, I would look to legislative history in an effort to discern the intent of the legislators. If it is a case that does not involve statutory construction, I will look for analogous cases which could

guide my decision.

Senator GRASSLEY. Thank you.

Now, I am going to ask specific questions of some of you. Judge Rawlinson, if a particular judge or court has a high rate of reversal on appeal, either on the court of appeals or to the Supreme Court, is that a problem? And if it is, what can and should be done to remedy the problem?

Judge RAWLINSON. There may be a number of reasons why there is a high rate of reversal. If I were fortunate enough to be confirmed as judge, I would make a commitment to make sure that I

followed the precedents that were put down by the Supreme Court and adhere to the principles that have been time-honored.

Senator GRASSLEY. Thank you.

Again, to Judge Rawlinson, in your view, to what extent, if any, do the rights protected by the Constitution grow or shrink with changing historical circumstances?

Judge RAWLINSON. It is my view that the Constitution has weathered the test of time and that the principles that are embodied in the Constitution have been well interpreted in a body of

law that has been put down by the Supreme Court. And I think that body of law should guide judges in their decisionmaking today.

Senator GRASSLEY. Under what circumstances do you believe it appropriate for a Federal court to declare a statute enacted by Congress unconstitutional? And are you aware of the recent Supreme

Court decision in *United States v. Morrison* and its 1995 decision, *United States v. Lopez*? And let me continue, and I can repeat

these, if necessary. Please explain to the committee your understanding of those decisions and their holdings regarding congressional power, because some commentators have accused the Supreme Court of judicial activism because of its decisions in those

cases, and whether or not you would agree with those commentaries.

Judge RAWLINSON. My view of the law is that statutes are entitled to a presumption of constitutionality, and I would begin my review of a statute with that premise.

It would be difficult for me to say in a given circumstance how a ruler might think that the canons of ethics in effect would preclude me from doing that, but I do start with the premise that a

statute is presumed to be constitutional, and it would be extraordinary circumstances that would persuade me to declare a statute

unconstitutional. I think it is incumbent upon a judge to interpret a statute in such a way as to save it as constitutional to the extent that that is possible to do so. But each case depends on the facts of that case and the precedent that binds the court in that particular instance.

Senator GRASSLEY. If you think you have responded to this part of the question, repeat it for me, please. But I brought up the cases of *United States v. Morrison* and *United States v. Lopez* as maybe just some examples. But we would like to get some understanding

of how you view those decisions and their holding regarding congressional power more specific than what you said about the presumption of congressional enactment being constitutional, and particularly in regard to those decisions that some have seen that as

judicial activism and whether or not you agree with that commentary.

Judge RAWLINSON. Without having had the opportunity to review the briefs, having heard the arguments of the attorneys, and being intimately familiar with the facts of the case, I would be not in a position to comment on whether or not the Supreme Court in my

view had become activist in those cases. I don't feel that I have sufficient information regarding the briefs and the

factual predicates

of those cases to make that type of judgment at this point.

Senator GRASSLEY. Moving on to another question for you, Judge

Rawlinson, in your view, is the use of race-, gender-, or national

origin-based preferences in such areas as employment decisions, for

instance, hiring, promotions or layoffs, college admission and scholarship awards, and, the awarding of Government contracts, lawful

under the Equal Protection Clause of the 14th Amendment?

Judge RAWLINSON. I think the Supreme Court has spoken definitively in the Adarand case that race-based

classification and programs based thereon are subject to strict scrutiny and that there

must be a compelling state interest in order to justify such programs and that any remedy that is based on race classifications

must be very narrowly tailored to correct whatever remedy is being

challenged, whatever remedy is being posited. And I have no personal beliefs which would prevent me from strictly adhering to the

tenets set forth in the Adarand decision.

Senator GRASSLEY. In 1989, you authored an article about the

Supreme Court decision, *City of Richmond v. Croson Company*. In

that article, you analyzed the Croson case and concluded that

"With detailed preparation and careful planning, remedial set-aside programs need not be considered a dying tradition."

Do you believe that that statement is accurate in light of the Supreme Court subsequent decision in *Adarand Construction v. Peña*?

And I would like to have you explain your answer.

Judge RAWLINSON. All right. The Adarand case I think further

elucidated the conditions under which a race-based program could

be sanctioned under the law, and I think that the strict scrutiny

that a program of that nature is subject to is clarified in the

Adarand decision and that any program that has a race-based classification would have to meet those strict

compelling-interest considerations that are set forth in Adarand. And if a case of that nature were brought to me for

review, I would be committed to judging it by the standards that were set forth in Adarand and would

apply the case as it has been decided.

Senator GRASSLEY. Before moving to Judge Darrah, I would like

to make a comment about the Ninth Circuit, not about your nomination or not about anything you have said today, but just to leave

with you a thought, assuming that you will be on that bench; that

is, it bothers me as a member of this committee and as a Member

of Congress when I compare the Ninth Circuit with other circuits

around the country that we would have in a short period of time

that circuit have 28 out of 29 decisions reversed by the Supreme

Court. And that is why I have spent considerable time asking

nominees for the Ninth Circuit about their views on precedents set

by the Supreme Court.

Now, obviously, as is the tradition at most of

these hearings, very few members come because we divide up the

work of so many hearings. So what we will do is leave the record

open until the close of business tomorrow for additional follow-up

questions, not that they will give you any trouble, and most questions are not too numerous. Once in a while somebody

might suppose that a member is asked 25 or 30 questions of one of you as

an effort to stall your nomination. It seems to me that whatever

questions are asked ought to be respected by the nominees of the

work of this committee and do your best to get them done very

quickly, because there has been some needless delay just because

somehow some nominee to the bench has decided that maybe all

those questions didn't have to be answered. And there is no need to have yours slowed up by the process of just not getting paperwork done. So I would advise you to very expeditiously give the best answers you can and get those back to us.

MARJORIE RENDELL
FRIDAY, SEPTEMBER 5, 1997
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:02 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Arlen Specter presiding.

Also present: Senators Sessions, Biden, and Kohl.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Good morning, ladies and gentlemen. We will begin the confirmation hearings this morning. We are pleased to have with us four very distinguished nominees-Judge Marjorie Rendell, now a judge of the U.S. District Court for the Eastern District of Pennsylvania, for confirmation for circuit court of appeals.

Senator KOHL. Thank you, Mr. Chairman. I do not have a statement today, but I would like to thank you for chairing this hearing

and I would like to put a statement into the record by Senator

Leahy. Senator Leahy is concerned about the pace of judicial nominations. We currently have more than 100 judicial vacancies, and

I am concerned, as he is, and so, as I would imagine, are you, Mr. Chairman.

I ask unanimous consent that Senator Leahy's statement be made a part of the record.

Senator SPECTER. Without objection, it will be made a part of the record.

I share Senator Leahy's concern. Of course, there could be no complaints about this processing. These nominations were submitted in late July and for some magical reason they have appeared out of turn today; at least the Pennsylvania ones were.

We will move as expeditiously as possible. I have a very high regard for the work of the Federal judiciary. I have been a practicing lawyer all my life; I consider that up to the moment. I know how important that processing is and we will work to accomplish that.

I want to note the presence of Staff Director Manus Cooney today and I want to thank him personally for expediting the process.

When the nominations came in as to the-thank you very much, Senator Mack and Senator Graham. I know Senator Mack is straining at the starting point for the next race and I know how busy you are, so we appreciate your being here.

Senator MACK. Thank you.

Senator SPECTER. I was saying I want to thank Mr. Cooney especially. After the nominations were submitted, he and I talked on

a number of occasions in the month of August and it has not been easy to have these set up during the first week back from recess.

So we thank you, Mr. Cooney.

Senator Santorum had wanted to be here, but is in Pittsburgh today on family business and he sends his regrets. I know that he is very supportive of the Pennsylvania nominees who are here.

At this time, I would like to ask Judge Rendell to step forward, please.

While you are standing, judge, will you raise your right hand? Do you solemnly swear that the testimony you are about to give in this proceeding will be the truth, the whole truth and nothing but the truth, so help you God?

Judge RENDELL. I do.

Senator SPECTER. It is a pleasure to welcome you here, Judge Rendell. You have an outstanding record as a district court judge, in the practice of law, and an outstanding academic record, graduating from the Villanova Law School in 1973 and Phi Beta Kappa from the University of Pennsylvania in 1969.

On a personal note, so that my own bias will be known, I have known Judge Rendell since she was a college student and she dated Ed Rendell, who then had the lofty position of assistant district attorney in Philadelphia and now is the mayor of Philadelphia, America's mayor as well.

Judge Rendell, we welcome you here.

TESTIMONY OF MARJORIE O. RENDELL, OF PENNSYLVANIA,
TO BE U.S. CIRCUIT JUDGE FOR THE THIRD CIRCUIT

Judge RENDELL. Thank you, Senator.

Senator SPECTER. Would you care to make any opening statement?

Judge RENDELL. I would like to have the record reflect those members of my family who are present with me.

Senator SPECTER. If you would introduce them, we would appreciate it.

Judge RENDELL. Yes. My immediate family-my husband, Ed Rendell, is on his way. The vagaries of the Metroliner probably have affected his being here, but I know he was on the 7 a.m. or whatever.

From my immediate family, our son Jesse, who was here the last time I had a hearing, is in his second day of his senior year in high school, so he is tending to his educational duties.

I am pleased to have my chambers family here; my secretary, Beth Cummings, who has been with me for 15 years; my past, former law clerk, Cheryl Solomon, who is now with a law firm here in Washington; and my current law clerks, Adam Levin, who graduated from NYU Law School, as well as Alison Conn, a graduate of Yale Law School. They have just started their tenure with me, so I am very pleased to have them.

Senator SPECTER. If you would all stand, we would appreciate it.

[The persons stood.]

Senator SPECTER. Thank you all very much.

Judge RENDELL. Thank you, Senator, and in addition to that, I would just like to say I am extremely pleased and honored to be here and am thankful to the committee for having this hearing.

Senator SPECTER. I should say, Judge Rendell, that your nomination has been pending for some time, unlike the district court nominees, and we will not burden the record with the reasons why. We are just glad to have you here today and move the process.

Judge RENDELL. Thank you.

QUESTIONING BY SENATOR SPECTER

Senator SPECTER. We are on a tight time schedule, which is customary around here. We have a vote scheduled at 9:50 this morning, and the Governmental Affairs Committee is going to start hearings at 10 and I am on that committee and early up on a round of questioning. But I know we have sufficient time to complete our work, but we will move expeditiously. Judge Rendell, are you committed to faithfully following the Supreme Court precedent and the rulings of other superior courts in your legal decisions?

Judge RENDELL. Yes, I am, Senator.

Senator SPECTER. If you are presented with a case of first impression, what principles will guide you or what methods will you employ in deciding that case?

Judge RENDELL. If the case involves an issue of statutory interpretation, I would look first to the statute and to its plain meaning.

Obviously, statutes are presumed to be constitutional in the first instance. And if the meaning were not plain, if there were ambiguity, I would look then to the legislative history to try to divine the

legislative intent, knowing full well, however, that sometimes that can be misleading. So, that would involve some careful scrutiny.

If the matter were a matter of interpreting the Constitution, I would look again to the text of the Constitution and to the historical perspective and background of it. And in all instances, I would

look at other precedent, or if not precedent, other cases, analogous cases decided by the Supreme Court or fellow circuit courts for guidance in how to make the determination.

Senator SPECTER. Could you cite any Supreme Court opinion which you think is particularly well reasoned?

Judge RENDELL. I think the Dalbert case that has to do with expert evidence is very well reasoned and has been of great help to

the trial courts in helping us determine the reliability of expert opinion which I think is becoming increasingly important. And Dalbert is well reasoned in that it lays out tests clearly for us to follow, so I would cite that case.

Senator SPECTER. Can you point to any case or specific areas of constitutional law where you think the Supreme Court improperly departed from the principles of the Constitution?

Judge RENDELL. Well, I guess I would make the judgment of that kind of case where the Supreme Court itself has made a judgment that it has erred rather than myself presuming to say they were wrong and, for instance, Plessy v. Ferguson would be a case that I would say fits that description.

Senator SPECTER. Judge Rendell, if you believed the Supreme Court had seriously erred in rendering a decision, how would you handle that in applying that law to a case pending before you?

Judge RENDELL. I would apply the Supreme Court precedent. That is the law of the land.

Senator SPECTER. What is your judgment on the constitutionality of the death penalty?

Judge RENDELL. The Supreme Court has held it constitutional and I will follow that in my decisionmaking.

Senator SPECTER. Have you had any death penalty cases come before you as a district court judge?

Judge RENDELL. I have had the trial of a case that was being prosecuted as a death penalty case under the crime bill, and I convened a jury and we were in the midst of a trial when the matter

was pled, a guilty plea. So I was embarking upon, in fact, the first death penalty case in our district. That was last fall.

Senator SPECTER. Do you have any conscientious scruples which would inhibit or prevent you from imposing or upholding the death penalty?

Judge RENDELL. No, I do not, Senator.

Senator SPECTER. Do you believe it is appropriate for the American Bar Association to take stands on political issues

such as abortion, affirmative action, gun control?

Judge RENDELL. I guess the appropriateness of the activities of any group would depend upon its mission. I am not personally familiar with the mission of the ABA.

Senator SPECTER. Have you been a member of the ABA?

Judge RENDELL. I have in the past. I am not currently. When I was in practice, in commercial practice, I found it helpful to receive their publications, but I have never been active. I think it is difficult, if they are purporting to speak on behalf of all of the bar,

for them to be taking positions on one side or the other of an issue.

Senator SPECTER. I am not sure about the appropriateness of that question, but it is part of the boilerplate.

Judge RENDELL. Yes.

Senator SPECTER. Since you are a friend and since I am presiding, I am going to ask you all the boilerplate questions.

Judge RENDELL. I didn't address it from the standpoint of ethics and obviously these are-I don't have any such cases before me.

This hasn't come before me.

Senator SPECTER. I have a lot of views on the ABA, but I don't know that they would qualify or disqualify me for anything.

On the subject of judicial activism, we always take up this question, and with all the preparation, I don't know that it is possible

for a nominee to give an inappropriate answer. Would you care to comment about the doctrine of judicial activism?

Judge RENDELL. I believe that a judge should decide the case before him or her, the issues before him or her, and not stray from

that. And I think my record on the district court shows that that is what I do do. I believe it is inappropriate for a judge to go beyond that, in light of the separation of powers. Our duty is to enforce and interpret the law and not to legislate. I happen to believe that and try to act accordingly.

Senator SPECTER. In one of my early sessions on the Judiciary Committee, Senator Thurmond, then chairman, asked a nominee a question: if you are confirmed, do you promise to be courteous? And I was amazed at the question because what was a nominee to say except yes. There were two nominees from Pennsylvania, Judge Mansman, who is now on the circuit court, and Judge Caldwell, and they both said yes.

Senator Thurmond said, the more power a person has, the more courteous the person should be. And as I reflected on that, that is as wise a comment as I have heard in this room. The competition hasn't been too heavy for wise comments in this room. But that is really important, and I say it only once to the nominees who are here on the importance of courtesy.

I have seen in my experience in the courtroom, and I have had a fair amount of it, a tremendous amount of conduct which is excessive by judges once they put on the robes-just really, really excessive. Once you are a judge, you are there. Some of us think a constitutional amendment might be in order to have Federal judges run every 6 years and, of course, to have Senators serve for life.

[Laughter.]

But I say with great seriousness the import of Senator Thurmond's admonition that you really ought to keep in mind when litigants and parties are before you that you ought to consider yourself as if they are really before the public and almost up for election, to have your comments judged and your demeanor regarded as if that were on the line.

Senator Kohl.

Senator KOHL. Thank you, Mr. Chairman.

Senator SPECTER. We have been joined, obviously, here by our

very distinguished colleague, former chairman of this committee, former ranking member of this committee.

Senator BIDEN. Former everything, but go right ahead, Senator.

Senator SPECTER. And current guru of this committee.

Senator Kohl.

QUESTIONING BY SENATOR KOHL

Senator KOHL. I will be brief, Judge Rendell. In your opinion, what are the most important decisions of the Supreme Court in the 20th century-the most important three decisions, and why?

Judge RENDELL. I believe that in terms of changing the law and setting precedent that will guide us-in the criminal area, I would have to say Miranda is one which is important in terms of changing the thinking or the balance, if you will, in criminal law in a

way unlike it was the first half of this century.

Brown v. Board of Education obviously made a radical change in our thinking at a time when the Supreme Court felt it was called

for. And the third area-I am trying to think of different areas of the law-again, I get back to Dalbert and the way we conduct our

civil cases. So often, civil cases come before us with experts or presumed experts, and I think Dalbert will make a big change in the

law in terms of cases that do and do not proceed to trial based upon the reliability of experts.

Senator KOHL. Thank you. Thank you, Mr. Chairman.

Senator SPECTER. Thank you very much, Senator Kohl.

Senator Sessions.

QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. Mr. Chairman, I think Pennsylvania and the three nominees that we are seeing here from the State appear to

have exceptional qualifications and appear to be the kind of nominees that will do an outstanding job as Federal judges.

I congratulate you and Senator Santorum and the President for

nominees that appear to be skilled and capable with good experience. You are to be congratulated. I know you have worked hard

in trying to have the kind of judges that we need in America.

Good-quality judging is important. I take it very seriously. My

staff and I look at nominees and give it some thought. It is a lifetime appointment. Courtesy, fidelity to the law, hard work, and

case management are the cornerstones of a good Federal judge. I have practiced full time before Federal judges for 15 years, and a good judge makes it a pleasure to be in court and a bad judge can make it a nightmare, or give you nightmares worrying about what is going to happen the next day.

I think these nominees appear to be the kind of nominees that will serve the Nation well. I do have another committee hearing to attend.

So I think it is a good group of nominees and I expect to support them.

Senator SPECTER. Thank you very much, Senator Sessions.

We have been joined by Mayor Rendell this morning. I understand he is here. Welcome, Mayor Rendell.

Senator BIDEN. Good thing he is not the nominee.

[Laughter.]

Senator SPECTER. Do you think the cross might be a little more extensive?

I am pleased to call on now our distinguished colleague, Senator

Biden.

QUESTIONING BY SENATOR BIDEN

Senator BIDEN. Mr. Chairman, I am completely objective in this nomination. The fact that the judge is bright, well educated, honest, balanced, and conscientious, has nothing to do with the fact

that I have known her since I have been in high school. She is extremely qualified for this job. She will be a great addition to the

third circuit, which has one of the most distinguished reputations of all the circuits in the history of the United States of America.

Some truly great jurists have served on that court.

Midge, as a judge, you will be taking a place where others have sat who have literally changed the face of America for the better, and I think you deserve to be there. I should ask you questions and pretend I am interested in your answers. I know you too well. I have too much respect for you, and I am completely confident in your ability to not only be a sound jurist, but to be a truly great one.

My one regret and I am sure it is yours, too, is that your dad is not here. He would be, and is, extremely, extremely proud of you.

Judge RENDELL. Thank you.

Senator BIDEN. I still can't figure out why you married a guy from New York, but I guess in time we will work that one out. I welcome the mayor as well. I think, quite frankly, judge, you have the better job. Clearly, the job security is better, and I think the decisions, although difficult, may be even easier to make.

I am excited about your nomination.

Judge RENDELL. Thank you, Senator.

Senator BIDEN. And I compliment you, Senator Specter, for pushing the nomination. You know, everybody thinks that bipartisanship is dead in this country. In a lot of places, it is not.

I am excited about it, Midge, and I tell you I think it is wonderful. Congratulations. I look forward to watching from afar your continued distinguished career.

Judge RENDELL. Thank you, Senator. I am honored and humbled by your remarks. Thank you.

Senator SPECTER. Thank you very much, Senator Biden. I had commented about Mr. Bingler earlier, John Bingler, and had said that he had been nominated and hoped that we would have him before this committee soon and that that was in process. I did not give any further explanation, but-

Senator BIDEN. By the way, I want to make it clear for the record that everything in my experience, knowing you for a couple of decades now--everything you have ever said, you have done, and I have absolute, complete confidence that you are trying your best to make sure Mr. Bingler gets before this committee. I appreciate that very much and I will pursue that with you.

Senator SPECTER. Thank you very much, and the reason that Judge Rendell married a New Yorker was because he had a very important position. He was assistant district attorney in Philadelphia.

Judge RENDELL. For one Arlen Specter, who was then the district attorney, I might add.

Senator SPECTER. We have had a lot of fun over the years.

Thank you very much, Judge Rendell. I think that your confirmation is as close to being assured as anything can be. Thank

you for coming.

Judge RENDELL. Thank you, Senator, and thank you again for

convening this hearing.

Senator SPECTER. Thank you.

Senator BIDEN. Mr. Chairman, before you begin, may I clarify the record? I referred to a circuit court nominee. I want the record to show that I have known her since high school. We go back all the way to high school; we have been friends for years. Thank you very much, Mr. Chairman.

ROBERT SACK
THURSDAY, MAY 14, 1998
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:44 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Ashcroft, Abraham, and Leahy.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. We are happy to begin here today, and I apologize to my colleagues for being a little bit late. I have been under

as much pressure, I think, as maybe all of you have been, and it has been a very tough day. I understand we are going to have a vote at 3 o'clock, so I want to make sure I can get all my colleagues taken care of before then.

So we will begin in this order. As I understand, it is pretty much agreed to. We will start with Senator Levin, then Senator Abraham, Senator Moynihan if he is here, Senator D'Amato, Senator

Bond, Congressman Clay, and Congresswoman Norton, then Congressman Upton. We are happy to welcome you Congress people

over here today. And then there is Congresswoman Kilpatrick here.

Is that right? She is not here? Well, let's start in that order, anyway, and we will start with you, Carl.

Senator LEAHY. Mr. Chairman.

Chairman HATCH. Senator Leahy.

Senator LEAHY. Mr. Chairman, I will simply put in the record my statement. I am glad to see that we have two nominees here from the second circuit. We have others pending, awaiting votes on the floor, and I would urge your and the Senate leadership's help in moving them quickly. Judge Winter has declared a judicial emergency in the second circuit. I watch this with some attention, of

course, because it is my circuit.

All of the Senators, the six Senators from the States representing the second circuit have written letters to the majority leader to move forward with the judges. The first one is Sonia Sotomayor whom I spoke about yesterday on the floor. The other is Chester Straub. Now we will have Rosemary Pooler and Robert Sack, who were nominated several months ago on November 6, 1997.

So I would hope these nominations might move quickly, and I know you will try to cooperate, Mr. Chairman. But we are getting into a very, very difficult situation in the second circuit.

Chairman HATCH. Thank you, Senator Leahy.

If we could have all five nominees come forward: Rosemary S. Pooler, Robert D. Sack, Victoria A. Roberts, Richard W. Roberts, and Ronnie L. White. If you will all stand, please take the oath. Do you swear the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. SACK. I do.

Chairman HATCH. Thank you. Please be seated.

I notice we have a vote on, so why don't I ask you to go vote and then come back, and I will start. Then I will go vote, and you take

over.

Senator Leahy is going to go vote, and then he is going to come back until I get back. Then he has another committee hearing, but he is going to try and accommodate us so that we don't have to have a big gap or delay here.

Senator LEAHY. I do want to note on the record, unless there is some extraordinary thing that comes out of this hearing I am not expecting-I have read the records of each one of these nominees, Mr. Chairman, and I intend to be very supportive of each of them. At least one I have known for some time. But I am going to be very supportive of them.

Thank you.

Chairman HATCH. Thank you, Senator.

In the order that I called you as witnesses-Ms. Pooler, Mr. Sack, Ms. Roberts, Mr. Roberts, and Mr. White--do any of you have any comments you would care to make? And you might want to introduce your families and guests who are with you, or friends.
TESTIMONY OF ROBERT D. SACK, OF NEW YORK, TO BE U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT

Mr. SACK. Thank you. I very much appreciate, Mr. Chairman, both the committee and the committee staff for what they have done to prepare for this hearing and for holding it. I am personally deeply moved to be sitting in this committee room today.

I would like to, if I may, first express my regret that my wife, who is recovering from surgery, is not here.

Chairman HATCH. We understand that.

Mr. SACK. She is very deeply disappointed. As you can imagine, she has been looking forward to this at least as eagerly as I have.

And my father is on the west coast and couldn't make the trip.

However, all my three children are here. If the chair will permit, perhaps I can ask them to stand as I name them. My children:

Deborah, Suzanne, and my son, David. And I would also like to recognize my secretary, Ann Wisniewski, who is here, and finally, to

acknowledge, without naming them, some of my partners who are in the chamber today and whose support, emotional more than anything else throughout this process, is something for which I am immensely grateful.

Chairman HATCH. Well, thank you. We are happy to welcome you all here, and you must be very proud.

Good to have you here.

Well, we are happy to welcome all of you here, the family members and friends. It is always nice to see you and nice to have you

in these hearings. These are important hearings. This is one of the most important things that the Judiciary Committee does.

I have some questions for you. Maybe we can start with the two circuit court nominees first.

Are both of you committed to follow Supreme Court precedent and the rulings of the Federal Circuit Court of Appeals for your district, the Supreme Court in your particular case, and giving the rulings of the Supreme Court full force and effect even if you personally disagree with such precedent or rulings?

Mr. SACK. Absolutely and without question, Mr. Chairman.

Chairman HATCH. What would you do if you believed the Supreme Court had seriously erred in a decision? Would you nevertheless apply that decision or your own best judgment on the merits?

Mr. SACK. I would be obligated absolutely to follow the Supreme Court.

Chairman HATCH. Well, take, for example, the Supreme Court's recent decision in *City of Boerne v. Flores* where the Court struck down the Religious Freedom Restoration Act. A lot of us feel like they made a terrific mistake there.

The chairman feels like they made a-

[Laughter.]

Mr. SACK. I would be required, nonetheless, to follow the ruling of the Supreme Court of the United States, Mr. Chairman.

Chairman HATCH. Well, as you can tell, I don't like that answer.

The fact is it is up to us to draft legislation that is constitutionally permissible.

Under what circumstances do you believe it appropriate to declare a law unconstitutional?

Mr. SACK. Again, all legislation would come to a court with a very strong presumption that it is constitutional, and I would think that as an appellate judge voting for that-to rule that a statute was unconstitutional would only do it if compelled by rulings of the U.S. Supreme Court or possibly previous rulings by which I would be bound if I were to become an appellate-a judge, previous rulings by the second circuit.

Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a Federal judge?

Mr. SACK. I would have no such compunctions, Mr. Chairman. I would follow the law.

Chairman HATCH. Let me ask you, please state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness under the equal protection clause of the

14th amendment and Federal civil rights laws of the use of race-, gender-, or national origin-based preferences in such areas as employment decisions-that is, hiring, promotion, or layoffs--college admissions and scholarships awards, and the awarding of government contracts. What would be your best independent legal judgment with regard to their lawfulness under the equal protection clause of the 14th amendment?

Mr. SACK. I agree, Mr. Chairman.

Chairman HATCH. I was hoping that Senator Leahy would be back. I think we will just temporarily recess until he gets back. If he has any questions, then he will ask those, and then I will be back in a few minutes. OK? We will take a few minutes.

[Recess from 3:18 p.m. to 3:35 p.m.]

QUESTIONING BY SENATOR ASHCROFT

Senator ASHCROFT. [presiding] If the committee would come back to order. The Senator who is the chairman, Senator Hatch, has welcomed me to begin with an opportunity to extend and continue the committee meeting. It is my understanding that he intends to return, but we are in the midst of what could be a series of votes, and so I think it is all in our best interest if we have an opportunity just to proceed. So I would be grateful for this opportunity,

and I thank the nominees for having remained and for being available.

Mr. Sack, is that your view of the Constitution?

Mr. SACK. Yes, it is, that the words of the Constitution are applied by the Court from generation to generation to different situations, but the words and the meaning of the Constitution remain the same.

Senator ASHCROFT. Do you mean that the words mean what they meant when they were brought into the Constitution?

Mr. SACK. It is possible-let me give you an example of why I

am having trouble-

Senator ASHCROFT. This is a debate. There are only about two judges on the court right now who really mean that they mean what the words-

Mr. SACK. Yes, but may I give you an example? I, of course, have been involved with the press clause, and certainly when James Madison, who, I gather, wrote it, he was not thinking about the Internet or television.

Senator ASHCROFT. If he was, he was far-sighted.

Mr. SACK. Well, he was a great Framers, but he wasn't that farsighted. And so to say the words change, I think that he probably-when he thought "the press," he was literally thinking of printing presses. So in that sense, there is-I think it's perfectly legitimate, nonetheless, for a judge in 1998 to consider the press to include television.

Senator ASHCROFT. I see that the chairman has come back, and I hope that I was properly informed that you would not be offended were I to go ahead with some questions, Mr. Chairman.

Chairman HATCH. No, no.

Senator ASHCROFT. I am glad to see you reappear, and I thank you.

Chairman HATCH. Thank you, Senator Ashcroft.

I am sure Senator Ashcroft was asking many interesting questions. Let me just make a caution to you. As you know, we have

had a very difficult time through the years, whoever has been in charge of this committee, putting judges through the committee and getting them confirmed. We consider this probably one of the most important functions of the whole Congress because you people, once you get on the bench, you are there for life and, frankly,

without any real obligation to the taxpayers or anybody else, other than your own personal moral and ethical standards.

It is my opinion that the judiciary has been the branch of government more than any other that has saved the Constitution for

these 200-plus years, and the reason they have is because they have literally upheld the Constitution for the most part, even though there are some notable examples that all of us could find fault with.

But this business of activism versus nonactivism is a very important issue to many of us here. I condemn activism, whether it

comes from the left or from the right, or anywhere else. It is not right for judges to substitute their own policy preferences for what the law really is. It is not right for judges to ignore precedent of the higher courts. It is not right for judges to just act as super legislators from the bench just because you have these lifetime appointments.

And if all judges did this, it wouldn't be long until the Constitution wouldn't be worth the paper it is written on. And the prime

example of judicial activism in this country, in my opinion, is the Ninth Circuit Court of Appeals where we have judges who could not care less what the law says. Their own judgments are more important than the law.

Sometimes the laws are wrong. Sometimes Congress gets it wrong. But unless you have a really good constitutional reason for overturning that, the best way to write that opinion is we don't agree with the law that has been written but it is the law, and help us to know why you don't agree and maybe we will change it. But

to just go and substitute your own ideas for the elected representatives of the country who have to stand for re-election have done is

really immoral and it really diminishes the role of Federal judges. Frankly, that is why the Ninth Circuit Court of Appeals is reversed virtually every time they decide a case. And there are notable conservative activist decisions that we could point out. I happen to think that the Bourne case is one of the most notable conservative activist decisions. It seems awfully odd to me that the first-mentioned freedom in the Bill of Rights, the freedom of religion, cannot rise to the dignity that the Religious Freedom Restoration Act said it should rise to. And, frankly, I will never quite understand that decision.

On the other hand, it still is applicable to Federal issues. But I think it should have been applicable across the board.

So I caution you, as you go on the bench—in fact, we are counting on you not being activists, not being people who are radical

judges who ignore the law just because you feel you know more about it than Members of Congress. Maybe you do, but that is the way our system works. And I don't think in most cases you do. But even if you do, that is still our system. You are not to make the laws. You are to interpret the laws that are made by those of us who have to stand for re-election. And if we don't do it right, we are going to get thrown out, and we all know it.

So it is important for you to understand that, and if you don't do that, then you demean and undermine not only the Constitution but our courts. And then it makes it even more difficult to get people through this committee.

It has always been difficult, so don't think it has just suddenly happened since the Republicans have taken over. You should have seen what we went through when the Democrats controlled this committee.

To make a long story short, I am on the side of the judges. I really believe that the judiciary has saved this country and saved the

Constitution, and I would challenge each of you to be part of that saving of the Constitution rather than undermining of the Constitution. I think it is very important for you.

I don't mean to lecture you, but I—yes, I did. I meant to lecture you for a few minutes.

[Laughter.]

It may be the last time I will be able to lecture you, but you never know. Every once in a while I get invited over to the Supreme Court, and you ought to hear what I tell them. Of course, they tell me, too.

But I don't mince any words when around them. I have had a major role in eight of the nine of them, and I know them all very, very well. And I don't mince any words when I am near them, and I respect all nine of them very, very much. And you should, too.

Well, we are going to try to get you through as soon as we can.

We know the second circuit in particular needs you both. We believe the other districts where you folks are going to have the opportunity need you as well. So we will do the very best to get you

through. I personally will be devoted to that, as I think you have seen through the intervening years as I have been chairman, and I just want to compliment each of you. You are very good people and very nice people, and I appreciate having you here and being able to meet with you and being able to go through this very important process.

I haven't asked you many tough questions. But that is not the purpose, either. I think the purpose is to just get your commitment to really live up to the rule of judging and the moral and ethical positions that judges really ought to live up to as you take these very, very important positions. I think they are the closest positions to godhood in this life. And having come from Utah, where

we had Willis Ritter, who thought he was God-and so did everybody else, as a matter of fact.

[Laughter.]

Who literally was a very brilliant man, but a very poor judge because he allowed his own biases to come in all the time. And he

was a friend of mine. I always did very well in his courtroom, and I always liked him. But the fact is he was a poor judge in the sense that he allowed his own personal predilections to always take precedent to whatever the law was. And sometimes his personal predilections were based upon bias, and you can't let that happen. No matter how much you might despise somebody, if they are right you have just got to swallow it and say the law helps them. And no matter how much you like somebody, if they are wrong you should not be upholding their position. You should be doing what is right. And if you do that, then this system of government will last another 200 years and it will be you people who will have helped to do that.

So I am going to do my best to get you all through, and with that, I think we will recess and hopefully have you all on the next markup, which should be next Thursday. So I want to thank each of you for being willing to serve. I know it is a sacrifice in many respects. On the other hand, it is a terrific opportunity to do an awful lot of good public service, and I am counting on each of you to be the best you could be.

Thanks so much.

Mr. SACK. Thank you, Mr. Chairman.

Chairman HATCH. We will adjourn until further notice.

BARRY SILVERMAN
WEDNESDAY, NOVEMBER 12, 1997
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:13 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Grassley and Feinstein.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, COMMITTEE ON THE JUDICIARY

Chairman HATCH. I apologize for being a little bit late. I apologize particularly to my colleagues as well as the nominees. I got held up with the media, please forgive me.

Today we have four excellent nominees for various courts: Barry G. Silverman, of Arizona, to be U.S. circuit judge for the Ninth Circuit Court of Appeals; Carlos R. Moreno, of California, to be U.S.

district judge for the Central District of California; Richard W. Story, of Georgia, to be U.S. district judge for the Northern District of Georgia; and Christine O.C. Miller, of the District of Columbia, to be a judge of the U.S. Court of Federal Claims.

We are happy to have all of you here.

We have Senator Feinstein, but shall we start with our colleague first?

Why don't we turn the time over to you and allow you to introduce your nominee here today. Before you do, though, I would put a statement of Senator Kyl in the record at this time.

Are there any other Members of Congress to testify? If not, then if the four of you will come to the dais, I think I will have all four of you come up at once. If you will just stand and take the oath, I think we can get you all sworn at once.

Do you swear the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge SILVERMAN. I do.

Chairman HATCH. Thank you very much.

Let's start with you first, Mr. Silverman. What I would like you to do is introduce your family, friends, anybody else you would care to introduce. We are honored to have members of the family here, and then if you would care to make any statement, we would love to have that at this time as well.

TESTIMONY OF BARRY G. SILVERMAN, OF ARIZONA, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Judge SILVERMAN. Good afternoon, Mr. Chairman, Senator Feinstein. My name is Barry Silverman. I am presently a magistrate

judge in the U.S. District Court in Arizona. I regret that my family isn't able to be with me today here in person, but my wife Georgia and my parents, Rita and Sol Silverman, from Phoenix, are with me here in spirit. I am very grateful to be here today.

Chairman HATCH. Glad to have you here.

Thank you.

QUESTIONING BY CHAIRMAN HATCH

Does anyone care to make any additional statement? All right. Then I think what we will do is ask some questions, and we will go from there. We will just come across, and each of you can answer these questions.

Are you committed to following Supreme Court precedent and the rulings of the Federal Circuit Court of Appeals for your district faithfully and giving them full force and effect even if you personally disagree with such precedents or rulings?
Judge SILVERMAN. Yes.

Chairman HATCH. All right. What would you do if you believed the Supreme Court or the court of appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment of the merits? You could take, for example, the Supreme Court's recent decision in the Adarand case involving affirmative action since that seems to be on everybody's mind.

Judge SILVERMAN. I am clearly bound by the Supreme Court decisions and would follow them, of course.

Chairman HATCH. All right.

Under what circumstances do you believe it would be appropriate to declare an act of Congress unconstitutional?

Judge SILVERMAN. I likewise would indulge the presumption of constitutionality whenever possible. Then I would look to whatever Supreme Court precedent there may be. If there's no binding Supreme Court precedent, I would try to find analogous precedent. I

would look to the legislative history, even though that is not definitive or the be-all and end-all, but it may be of some help in resolving it.

Chairman HATCH. OK. Now, you have stated that as a circuit or district court judge, respectively, or as a judge on the Court of Federal Claims, that you would be bound by Supreme Court precedent

and the rulings of the Federal circuit court of appeals for your district. There may be times, of course, when you are faced with cases of first impression.

Now, what principles will guide you and what methods will you employ in deciding cases of first impression? Let's start with you, Judge Silverman.

Judge SILVERMAN. Well, again, first, the presumption of constitutionality. Then when it comes time to try to interpret, to try to go

from there, we would look first to the intent of the Framers of the Constitution. If there are not binding cases on point, I would look to see if there are analogous cases that may be of some help. And then when all is said and done, as I would look back on a proposed decision that I would make, I would ask myself if it makes common sense and is it fair. But the starting point is the presumption of constitutionality and the intent of the Framers as the point of departure in an analysis of constitutionality.

Chairman HATCH. Let me direct some questions to you, Judge Silverman. Please state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness under the equal protection clause of the 14th amendment and Federal civil rights laws of the use of race-, gender-, or national origin-based preferences in such areas as employment decisions as hiring, promotion, or layoffs, college admissions and scholarship awards, and the awarding of government contracts.

Judge SILVERMAN. In my opinion, race-based classifications are inherently suspect. They are subject to the strictest scrutiny, and I agree with Adarand that even when they are-when they pass constitutional muster, they must be carefully, narrowly tailored to redress the compelling interest at issue.

Chairman HATCH. What would it take to pass constitutional muster?

Judge SILVERMAN. Careful tailoring is the first thing that comes

to mind; compelling interest is another. Off the top, I cannot-I can't think of a circumstance right now that I could cite to you as one that would pass muster.

Chairman HATCH. So it's extremely rare for things to pass muster?

Judge SILVERMAN. Yes; it's not impossible, but it's very rare.

Chairman HATCH. Thank you. My time is up.

Senator Feinstein.

QUESTIONING BY SENATOR FEINSTEIN

Senator FEINSTEIN. Thank you, Mr. Chairman.

In the last Congress, the number of Federal death penalty acts were increased from about a half a dozen to more than 50. I would like to ask each one of you how you would handle death penalty cases and what your view on the death penalty is. And do you believe the Constitution permits the imposition of a death penalty sentence?

Judge SILVERMAN. I agree. The Supreme Court has ruled that it's constitutional. I agree that it is constitutional, and I would affirm death penalty cases in the appropriate case.

Senator FEINSTEIN. I notice that many of you are judges, and one of the things that I have found in talking with some of the people that have gone from either a superior bench or another bench to the Federal district court is that very often the docket they encounter is very heavy. I would like to ask this question: How would you handle your docket?

Judge SILVERMAN. Well, I'm from Maricopa County, AZ, the home of civil delay reduction, and I can tell you what we've done, and I think it's been successful. The key is, first, early case management by the judge, which includes, as Judge Moreno says, setting deadlines, setting next events in the case, and sticking to it; firm trial dates and holding counsel to the trial dates and not granting continuances unless there's really genuine, genuine good cause.

Second, implementation as soon as possible of alternative dispute resolution mechanisms; either settlement conferences or diverting cases out for arbitration or mediation has also been helpful.

And, finally, when push comes to shove and the case gets tried, the judge has a duty to decide the case promptly and move on to the next one.

Senator FEINSTEIN. Thank you very much.

Thanks, Mr. Chairman.

Chairman HATCH. Thank you, Senator Feinstein.

Senator Grassley.

QUESTIONING BY SENATOR GRASSLEY

Senator GRASSLEY. Congratulations to all of you. I wasn't here when you were sworn in and when you gave your opening statement, but congratulations, anyway. I just have a few questions.

I am going to ask all of you-well, let me ask-I think except for Judge Miller. I don't know whether you would be involved with this issue or not, but for the others of you that will be on the district court or courts of appeal-by the way, first of all, let me tell you I have got very much an interest in the judicial process and prosecuting process that is called qui tam. It is when an individual can go into court when the U.S. attorneys don't or where the U.S. attorneys use some of their information, qui tam. And I was involved with that legislation, so I kind of-and I probably wouldn't ask this except just last week, after about

three courts of appeals and I think several district courts had always upheld the constitutionality of it, there was a district court

judge in Texas that ruled that these statutes were unconstitutional.

Do any of you have views as to the constitutionality or unconstitutionality of the statute?

Is there anything about the process that you find obnoxious?

Judge SILVERMAN. No.

Senator GRASSLEY. OK. Well, thank you.

We will move onto another question. I would like to have Judge Silverman and Judge Moreno think about this. I think you have both agreed in your discussion with Senator Hatch that laws passed by Congress must be given deference in the presumption that they are valid and constitutional. What about citizen initiatives?

We have this situation. I suppose you could cite several from California and the ninth circuit, but the one that in *Jones v. Bates* where the three-judge panel has set up a dual standard as a result of that case, should citizen initiatives be given a presumption that they are constitutional?

Judge SILVERMAN. Yes. Yes; of course.

We in Arizona have an initiative, a referendum procedure. They are presumptively constitutional. They are the grassroots will of the electorate, and the electorate ought to be presumed to have known what it has done, and are entitled to great deference just as any other law would be.

Senator GRASSLEY. Could I ask each of you, then, if you disagree with the decision in the *Jones* case?

Judge SILVERMAN. I disagree with the decision and agree with the dissent.

Senator GRASSLEY. Judge Silverman, many people believe that the ninth circuit is just too big and unwieldy to function effectively. Do you believe that courts can get too big, and, specifically, do you believe that the ninth circuit is too big or at least should not get any bigger?

Judge SILVERMAN. Well, there are pros and cons to dividing the circuit up. I do not think it would be advantageous to have the circuit get any bigger. There are economies of scale. In some respects,

having large circuits, there is less administration and that sort of thing. We have less divisions amongst circuits, the fewer circuits there are, but, by the same token, sometimes the circuit can get so big that it gets out of touch with the districts that comprise it. So there is something to be said for both sides of that. I am not really sure how I would resolve it.

Senator GRASSLEY. OK. Thank you, Mr. Chairman.

Chairman HATCH. Thank you.

I have a lot of other questions, but I am satisfied, listening to the four of you, that you are excellent nominees.

As you know, I am death on judicial activism. Five years ago-

Senator GRASSLEY. Oh.

Chairman HATCH. You did not know that?

Senator FEINSTEIN. No kidding.

Chairman HATCH. Do not tell me none of you knew that.

But, you know, 5 years ago, people did not really understand what that was. I think everybody understands today. It is important.

Let me just make this case. As people can easily see around here,

if they really know what is going on, I have worked very hard to fill these judgeships. The Ninth Circuit Court of Appeals, in particular, has been very, very difficult to fill, and one of the reasons

is-and you are going on that, Judge Moreno--one of the reasons it is so difficult is because of the activism of that court, and these judges think that they are standing up for liberal principles when, in fact, they are undermining the judiciary across the board, and even members of the judiciary from the left to the right are very critical of what they are doing.

If you go on that court and you become one of those, you are doing the judiciary a great deal of harm. It is very difficult knowing that that court is the most reversed circuit court in the country. It is very difficult to get the nominees through the committee, and it is a tribute to you that you are going to go through the committee and hopefully onto the court as quickly as possible.

Now, just so everybody knows, I intend to have Margaret McKeown-I want my colleagues to know this-who will also come up for the Ninth Circuit Court of Appeals and Susan Mollway from Hawaii on the next hearing. She is for the district court, but Margaret McKeown will be for the ninth circuit, but I am counting on

you when you get there to just be a great judge.

I do not really care if you are liberal or conservative. Naturally, I think I would prefer you to be conservative, but the fact is, it is not that important if you observe the rule of judging. Judges are not-they are the closest thing to God in this world, but the fact of the matter is, they are-you are nominated and confirmed for life for these positions, to interpret the laws, not make them.

Now, sure, you have cases of first impression where you have got to decide what the law really is. Sure, you have to split the baby sometimes, so to speak, to decide any particular-some of these particular cases, but I think you know what I am talking about when I talk about judicial activism, and I do not mean to lecture you, but I am telling you that it is a big problem to us on the Judiciary Committee and it should be because some of the judges in

this country really are activists who just substitute their own policy preferences for what the clear law is, and that is not right.

You said today that if the death penalty came before you, you would have no problems at all with sustaining it because that is the law of the land. There are three judges in the Ninth Circuit Court of Appeals who have never voted in their whole tenure on that bench to sustain a death penalty.

Now, I have to admit, I do not like the death penalty personally, but it is the law, and I believe it is something that needs to be the law because I do believe that it is a deterrent if only for those who have committed murder so they do not do it again in prison or elsewhere. And we have plenty of illustrations to show that they do.

So it is very important for you to set examples as members of the Federal judiciary. I love the Federal judiciary. I fight for you. I fought for the pay increase. I wanted it separated for more pay. I got that through the Senate, could not hold it in conference. I think the judiciary is the reason this country is great. I think it is the reason the Constitution is observed in this country, but if judges start doing whatever they want to rather than observing what the law is and following it the way it is, then it will not take

long until the judicial system will undermine this very country that you now are sustaining.

So this is very important. I think all four of you are excellent nominees. I commend the President for sending you here, and we are going to do everything we can to get you through.

I believe they will be on tomorrow's markup. We are going to put you on the markup tomorrow. Now, whether we can get you through in this timeframe or not, we only have tomorrow, I think.

It will be probably the last day. I am not sure, but do not worry.

It will carry over, and we will do the best we can.

I also do not think it is fair to have you standing in limbo when you have to-and each of your cases, it is not so bad because you are already either a magistrate or judges, but where a person is

practicing law and has to wind down that practice, it is a big problem, and I would like to have more cooperation in resolving some

of these very serious problems.

I, for one, do believe that the President, whoever the President may be, is the President, and that President has a constitutional

right to make these nominations. We have a constitutional obligation that unless there are really significant reasons for rejecting a

judicial nominee, to confirm, not with a blank check, but to confirm those that the President has nominated.

So understand that you can help others by your actions when you get there. It is really important. In fact, I get it mixed up. It is you, Mr. Silverman, that is going on the ninth circuit, but that you are going to be within the ninth circuit.

Judge SILVERMAN. I thought you knew something I did not know.

Chairman HATCH. You would not want to be on there with the type of judges they have there right now. We are counting on-

Senator FEINSTEIN. Oh, oh.

Chairman HATCH. I am just kidding. I thought I would just throw a little here-we are kind of counting on you, Judge Silverman, to make a difference.

Judge SILVERMAN. Mr. Chairman, I commit to you that I will do that.

Chairman HATCH. Well, I commit to you that I will be watching.

Senator FEINSTEIN. Mr. Chairman, I think Judge Silverman probably wins an award for the quickest processed nominee, at least since I have been on this committee.

Chairman HATCH. You know, when you put up the nominees, we-

Senator FEINSTEIN. I have been trying to figure out what your magic is.

Judge SILVERMAN. Well, I am a magician.

Chairman HATCH. Do not tell us that.

Let me just say this, that when we get good nominees, we try

to put them through. Now, I have to admit, I wish we could do better. The committee is not totally without some fault, too, but we

have worked hard, and we have tried to move nominations as quickly as we can.

We have 35 confirmed judges this year, 8 are pending, 4 today.

That would be 12 more. If we can, that would be 47 total possible judges. That is far better than our colleagues on the other side did

during a number of years during the Bush and Reagan administrations, when there were actually more vacancies.

By the way, we have about 40 vacancies that have not gotten any nominees, and as hard as I try, I have never quite been able to get nominees confirmed who are not nominated. So, you know, I get a little tired of all the screaming and shouting, but the point I am making is each of you can make a difference for people who follow you here before the committee by being good judges and observing the Constitution and doing what really is expected of you, and if you will do that, you will help the Federal judiciary immensely, regardless of who the chairman is or who is in charge of this committee. I think you will find that all of us will work harder to make sure that these positions are filled, and we will do our very best for you.

I will do my very best to get you through before the end of this session, which means probably tomorrow, but that means that we will put you on the markup for tomorrow, and, hopefully, all four of you will pass that, but, if something happens that you do not get through this session, we will do our very best to get you through as soon as we come back after the 20th of January.

Judge SILVERMAN. Thank you very much.

Chairman HATCH. I want to thank each of you. I want to thank your families for being with you, and your friends. I think it is a real tribute to all of you to have all of these folks with you, and we wish you the very best, and I hope you will not forget us on the Judiciary Committee.

We believe once you get there, you can observe things that this committee needs to do, and we would love to receive correspondence. I know there is a fine line, but we would love to receive correspondence from you. We would love to have your suggestions. We would love to be able to do a better job here.

And believe it or not, with all of the wide diversity of beliefs on this committee, we do get a lot done, and I think you find that there are many times when we get together as Democrats and Republicans and do what is right for this country, as well as some of the fiascos that occasionally occur as well.

We want to thank each of you for being here, and with that, we will recess until further notice.

ALLEN SNYDER
WEDNESDAY, MAY 10, 2000
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 3:07 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Arlen Specter, presiding.

Also present: Senators Biden and Smith.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. [presiding] Good afternoon, ladies and gentlemen. We are going to proceed with the Judiciary Committee hearing on confirmation of six nominees for the Federal bench.

My comments are going to be somewhat more extensive than customary.

The nomination hearings today in a sense break a logjam where we have had some seven vacancies, and a determination has been made to move four forward to confirmation at this time.

There is, as is widely known, some difference of opinion as to the confirmation of judges so close to an election, and it was the judgment on the consensus basis that this would be a good accommodation to move four judges at the present time.

There are candidly some in the Republican Caucus, not that it is a secret, who would like to move no judges at all in an election year. We have broken that logjam in a number of matters.

With my concurrence, we recently confirmed Judge Paez and Judge Berzon in the Court of Appeals for the Ninth Circuit. There had been occasions when my distinguished colleague, Senator Biden, chaired this committee when in an election year there were limits as to how many judges were to be confirmed.

I mention that only by way of background, and to say that there are two other very distinguished individuals who have been nominated by the President, Judge Lagrone Davis, of Common Pleas

Court, and Mr. David Fineman who is on the board of the Postal system. I had talked to both of them to tell them what the considerations were. It is still possible the logjam could be broken further. It is perhaps doubtful, but I think it is fair to say that they are very highly regarded. Their names are in the public domain because their nominations have been submitted. I am personally committed to supporting them, as are others, and we will see what events will occur with respect to those nominees.

Candidly, if a Democrat is elected to the Presidency, all the nominations will move through as rapidly as possible. If a Republican is nominated, then there ought to be some choice there.

Before yielding to my distinguished colleague from Pennsylvania, let me yield to my good friend from Delaware who was chairman of this committee, Senator Biden.

STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BIDEN. Thank you very much.

I do want the record to note, though, that when I was chairman of this committee, not only did we confirm a lot more judges, we confirmed 66 judges when the last year Bush was President. You can ask Phil Gramm this of Texas. I confirmed five judges over the objection of my colleagues, with 4 hours left to go in the last day, the last hours in the evening, which prompted Phil Gramm to come up and thank me and say something complimentary. He said, "By the way, I just want you to know, I would never do it for you." That

is why I like him. He is straightforward. It is true. You all are not doing it for us, and it is a shame that we are not.

I must also point out, and I admit that I am not representative

of my caucus, that during the Reagan years, I am the guy that introduced the bill to add 88 additional District Court judges during

a Republican administration, over the objection of my entire caucus. So we did not slow them up like now.

Unfortunately, I think the Democrats will have learned the

wrong lesson from the conduct of the caucus this last 4 years. If

President Bush is elected, I can assure you, and not with my concurrence, you will see most of the judges stopped who are Republican judges, and it is a shame because the judges should be above politics in this.

There are certain things where there are clear disagreements

about the ideology of a judge, and that is worth fighting over and

we should fight over it. We should identify those judges if there is

a problem and just go to battle on them, but, if not, we should

move the judges that are not controversial.

I am hopeful that we will not learn the lesson, but my experience

after 28 years here is that whatever the Democrats do to the Republicans, the next group will come along, learn the lesson, and

take it to a higher grade level.

It used to be when I was Ranking Member and Strom Thurmond

was chairman, he would say no judges would be confirmed after

the conventions, and that is what was done. When I became chairman, I said no, we are not going to have that rule, we will go

straight up to the time we adjourn. After I lost the chairmanship,

we went back to initially the summer. Now we are even back to

something that starts at 4 years out, and I think we have set a terrible precedent and I think we are going to pay for it.

I will conclude by saying this. There was a recent article written

by a national columnist that was shown to me. I will tell you. It

was by Kamen. There was a line in there saying the Democrats say

the Republicans are holding up judges, and that when Biden was

chairman, they let through-and they named all the judges let

through. He said, in parentheses, "Biden has a quaint notion"-that is the quote--"a quaint notion that qualified judges for the

District and Circuit Court should be above the political fray in an

election year." He went on to say, "Too bad Kennedy and Leahy

could not have gotten Biden in a dark alley and changed his mind

about that back then," meaning if I had done what you have done,

we would not have had the Republican judges.

I am no longer chairman. Others are. I promise you, they do not

have to get me in a back alley. They are already in a back alley,

and they are waiting and it is a shame. It is a shame. We have

set a horrible precedent.

But with that, we are here today and we have got four distinguished people who both you guys are supporting, and I am proud

of that, that you are doing it. They will help the caseload on the

Eastern District. We have a Circuit Court of Appeals judge for the

District Court Circuit, and we have a Louisiana judge. So, hopefully, we can move through and gentleman these six

and maybe get

a few more before this year is over, but I have told everyone, and

I want to tell the press, if the Republican Party lets through more

than 30 judges this year, I will buy you all dinner. And by the way,

there are 90 vacancies.

Senator SPECTER. Thank you very much, Senator Biden.

Senator Biden and I, as has been noted, have a very congenial relationship from having taken more train rides together from Philadelphia to Wilmington over the past 20 years than I think any two Senators in history, at least we know of none-

Senator BIDEN. That is true.

Senator SPECTER. [continuing] Who can compare with that kind of a conversation record, and record of general agreement.

We now welcome our distinguished colleague, Senator John Warner.

STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Thank you, Mr. Chairman, my good friend, Senator Biden, and Senator Smith.

Senator Biden, on your subject, I did not hear the opening comments of our distinguished chairman, Mr. Specter, but-

Senator SPECTER. I would be glad to repeat them for you, Senator.

Senator WARNER. Oh, that is all right, but I hope you had the benefit of the statistics that we shared with a luncheon group today, the usual Wednesday luncheon group. We discussed this subject for a half-hour, and I must say Senator Hatch spoke up very eloquently and said how hard and courageous he is trying to be on this issue.

Senator BIDEN. Do you think you will get more than 30 judges for the whole year, John?

Senator WARNER. Well, I am just telling you what occurred.

Senator BIDEN. I understand. I am just curious.

Senator WARNER. I was commenting on his leadership.

Senator SPECTER. Do you want the witness to be sworn?

[Laughter.]

Senator WARNER. So there are some very interesting statistics out there going back over the various administrations. At first glance, I do not think we are too far apart from the norm of what has been done through the years.

Nevertheless, gentlemen, I am here today, and I am really privileged and honored to be here to introduce this very outstanding nominee to serve on the Circuit Court of Appeals to the District of Columbia.

I must say, if I could add a personal note, following my graduation from the University of Virginia Law School in 1953, I was

privileged to serve as law clerk to Judge E. Barrett Prettyman, the United States Circuit Court of Appeals for the D.C. Circuit. Judge Prettyman later became chief judge, and with the help of my 99 colleagues in the United States Senate, I was privileged to name the Federal Courthouse in honor of Judge Prettyman.

I must say, today, in this room, sits Judge Prettyman's son, my lifelong friend, E. Barrett Prettyman, Jr., who brought to my attention this eminent and extraordinarily well-qualified nominee to go on that bench.

Today, almost 47 years after having served as law clerk for the now-late Judge Prettyman on this Federal Appeals Court, I am pleased to support the nomination of Allen Snyder to the same court on which Judge Prettyman once served.

Mr. Snyder has received the top ranking-I repeat the top ranking--of the ABA Standing Committee on the Federal Judiciary, and

his record indicates that he will serve certainly as an excellent jurist.

After graduating Phi Beta Kappa from George Washington University in 1967, Mr. Snyder went to Harvard Law School where he

served as editor of the Harvard Law Review and graduated with an A average, Magna Cum Laude. All of these achievements, I never reached that pinnacle, and that is why, I guess, I am here and not on the court.

Mr. Snyder then had the honor to serve as the law clerk to two United States Supreme Court Justices, as did Judge Prettyman's son, I may add, at the time I served his father. Having clerked for Justice John Harlan and later clerking for the current Chief Justice of the United States Supreme Court, Chief Justice William Rehnquist.

After completing his clerkship, Mr. Snyder worked as an associate for the law firm of Williams & Connolly and later became a

partner of my old law firm, Hogan & Hartson. Mr. Snyder has been a partner with Hogan & Hartson since 1979 and is currently chair of the firm's litigation practice area.

In addition to Mr. Snyder's strong academic background and practice experience, I am quite impressed by a particular statement given by Mr. Snyder in response to the Judiciary Committee questionnaire. In the 22 years I have been privileged to serve in the

Senate and numerous times I have sat at this bench introducing candidates, I have never seen a more profound statement than this one. Listen carefully, colleagues.

When asked to discuss his view of "judicial activism," Mr. Snyder referred to himself as a jurisprudential conservative. That is pretty good. I had never heard of the word before, but, anyway, it must be there, meaning he would decide cases properly in front of him without looking for causes and without reaching for issues not properly presented to the court. Now, that is the very essence of what we strive to do here is to find that type of individual.

Mr. Snyder stated that he would not decide cases based on personal agenda, but would rather "recognize his role as one of faithfully interpreting and implementing the Constitution and the law of the land." I am sure that the members of this committee will agree with me that Mr. Snyder's philosophy on the role of the judiciary in our domestic system of government is the appropriate one

and the standard that we have sought for so many years.

Mr. Snyder is obviously a very accomplished American. He is well qualified to serve as a judge on this very important court, and I am certain that he will in his position serve with honor, integrity, and distinction.

I am pleased to add that bit of support. Thanks very much.

Senator SPECTER. We are very pleased to have you here, Senator Warner.

Senator WARNER. I wonder if he might introduce his family who came with him for the record.

Senator SPECTER. Please do.

Mr. SNYDER. Thank you, Mr. Chairman.

I am very pleased to have here with me today my wife of 30 years, Susan Snyder, and we have two wonderful daughters, our daughter Carolyn Snyder who is a freshman at Amherst College and flew in today in the middle of her final exams to be here, our other-

Senator BIDEN. We are going to make it worthwhile for you,

kidido.

[Laughter.]

Mr. SNYDER. Our other wonderful daughter is a graduate student and is in Wyoming right now where she has some teaching responsibilities and could not join us today.

I am also very pleased to have here and to introduce to the panel my father, Henry Snyder, who is 91 years young and who has been a great inspiration to me throughout my life, as well as having here my sister, Charlotte Zuckman, who is there, and her husband, my brother-in-law, Harvey Zuckman is here, and their daughter and my niece, Jill Zuckman.

Finally, I would like to introduce to the committee my secretary of almost 27 years, Linda Heimple who has been a tremendous help and inspiration to me as well.

I am pleased to have many other friends and family here today.

I will not take further time of the committee, but thank you, Mr. Chairman, and thank you very much, Senator Warner, for your gracious remarks and courtesy.

Senator SPECTER. Senator Warner, before you go, you had made a comment about clerking for Judge Prettyman.

Senator WARNER. Yes.

Senator SPECTER. And you also made a comment that your academic record was not quite as distinguished as Mr. Snyder's.

Senator WARNER. That is correct.

Senator SPECTER. I will not ask you what your academic record was.

Senator BIDEN. Do not ask me either.

Senator SPECTER. I still will not ask you, but I will ask you a question to which I know the answer in accordance with the dictums for trial lawyers.

Senator WARNER. Which both of us here, I, Assistant U.S. Attorney, and you, the top-

Senator SPECTER. But I think people would be interested in hearing the short story as to how you got the clerkship for Judge

Prettyman, notwithstanding your record was not as good as Mr. Snyder's.

Senator WARNER. I have never revealed that story publicly before. [Laughter.]

Senator SPECTER. Well, you have a right to remain silent.

Senator WARNER. Well, very briefly, His Honor had never engaged his law clerk, anyone who was not a Law Review editor or

stood one or two in his class. That, I had not done. I had my law school interrupted by a tour of duty in the Marines in Korea and, therefore, somewhat disjointed, but, nevertheless, I came back and the wonderful dean of the law school at that time, Dean Ribble, tried to discourage me in every way for seeking the position. But

I finally made a deal with him. I said if you get me the appointment, I will get the job, and he got me the appointment and now

I had to figure out how I got the job.

My recollection, Judge Prettyman had been on the bench for 8 or 9 years at that time, and I took 2 months and memorized every opinion he had ever written. When I went in to see him, he inquired as to how I got there because I was not in the cut normally

and there were nine other students out there in that top rank. I said, "Your Honor, if I cannot answer any question you may ask about any decision you have ever written, I would not suggest you engaging me." He never blinked an eye, asked a series of questions, said, "Excuse yourself and invite the next student."

And in my office is a short letter dated 1953, two paragraphs. "I am designating you as my law clerk for the year of 1953-54. Your salary is \$3,100. You will report for duty on the 1st of September." That was the beginning of my public service career. I thank you.

Senator SPECTER. Thank you, Senator Warner.

Senator BOB SMITH. Senator Specter, could I just make a clarification to my friend from Delaware on his numbers, 30 seconds?

Senator SPECTER. Senator Smith, you are entitled to whatever time you want.

Senator BOB SMITH. Senator Biden, you said there were 90 vacancies. In fact, there are 80, and out of the 80, 36 do not have a nominee which means there are 44 vacancies not acted on. So I think that is a lot different than saying-

Senator BIDEN. Let me be precise. There are 80 vacancies, and there are 8 future vacancies that will come up within the next 6 weeks to 8 weeks. I predict there will be another 6 to 8 after that. There will be well over 90 before the year is over. I have been doing this too long. I assumed you knew that as well as I did, but my mistake. I am just saying what the vacancies are.

Senator BOB SMITH. There is no nominee for 36 of those. In fairness, we ought to at least be fair.

Senator SPECTER. I would like to acknowledge the presence here today of Thomas Klein of the distinguished law firm of Klein & Specter, who is the chairman of the Pennsylvania Nominating Panel for the Eastern District who goes through a merit bipartisan selection process.

Tom, if you would stand, we would appreciate it, to be acknowledged.

Mr. Snyder, if you step forward, we will take your nomination first for the Circuit Court. Would you raise your right hand.

Do you solemnly swear that the testimony you will give before the Judiciary Committee of the United States Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. SNYDER. I do.

Senator SPECTER. Welcome, Mr. Snyder. We would be pleased to hear any opening statement you might care to make before submitting to questions.

TESTIMONY OF ALLEN R. SNYDER, OF MARYLAND, TO BE U.S.

CIRCUIT COURT JUDGE FOR THE DISTRICT OF COLUMBIA

CIRCUIT

Mr. SNYDER. Thank you, Mr. Chairman.

I do not have any opening statement. I do want to thank the chairman and the committee for giving me the honor of being here for this hearing, and I stand ready to answer any questions that the committee may have.

Senator SPECTER. Mr. Snyder, you had talked, as Senator Warner pointed out, about jurisprudential conservatism. How would

you define jurisprudential conservatism?

Mr. SNYDER. Mr. Chairman, I think a jurisprudential conservative is a judge who decides the cases in front of him or her, does

not reach out for issues that are not properly before them, decides those cases based upon the facts in the record in that case and based upon the law and precedent rather than trying to implement his or her own personal views or personal agenda.

In my view, the role of a judge is to follow the law as it is laid down by the elected officials. Judges are not elected in our Federal

system, and in my view, they do not have the right to implement their own views of public policy. The elected branches of Government are there to deal with public policy issues. A jurisprudential

conservative looks at precedent to follow those precedents and to follow the will of the people as expressed by the elected representatives.

Senator SPECTER. Well, that answer comprehends, Mr. Snyder, enactments of Congress or statutory enactments. It does not encompass the Constitution. What about jurisprudential conservatism with respect to the Constitution?

Mr. SNYDER. I think that courts interpreting the Constitution essentially should approach the task in the same way that they look

at statutory issues, and that is that they should first look at the plain language of the Constitution, and where there is any doubt as to what the Constitution means, I think they should then look to the intent of the framers of the Constitution.

Obviously, a lower court judge must also look and must be bound by the precedence of the higher courts.

Senator SPECTER. This committee had considerable inquiry into the doctrine of original intent in some of our confirmation hearings.

Do you believe that the Supreme Court of the United States-now, this is not your court, but you might have a matter which is a matter of first impression-should be bound by the doctrine of original intent? You mentioned that in your answer.

Mr. SNYDER. Fundamentally, I believe that the court should look at the language of the Constitution and at the intent of the Framers, yes, sir, because I do not believe that judges should be reaching out for policy ideas even in the constitutional area that do not emanate from the Constitution.

Since the Constitution is broadly phrased, much more broadly than most statutes, there are issues where to apply those phrases to present-day circumstances, one has to go beyond pure original intent.

For example, in the First Amendment, we have to apply the First Amendment to radio, television, and the internet, and there are issues where the literal original intent simply would not provide you the answer, but I think the basic concept of what was intended by the constitutional Framers should be critical. Yes, sir.

Senator SPECTER. Let's take that specific case, and perhaps as famous a case as there is in the Supreme Court lexicon, *Brown v.*

Board of Education. There are two dimensions that I would appreciate your comments on. One is *Brown v. Board of Education* was

controlled by *Plessy v. Ferguson*, where the Supreme Court of the United States had held before the turn of the 20th century that separate but equal satisfied the equal protection clause.

Then, as a matter of original intent, the Supreme Court of the United States in 1954 looked at the intent of the Framers of the Fourteenth Amendment, the equal protection clause, due process clause.

The balconies of the United States Senate were segregated when the Fourteenth Amendment, equal protection clause, was adopted or ratified later. What considerations were present? I am sure you agree with *Brown v. Board of Education*.

May the record show a nod in the affirmative.

Mr. SNYDER. Yes, sir.

Senator SPECTER. I do not want to assume too much here.

What considerations would justify disregarding original intent where obviously the Congress had supported segregation and a 50-year-plus precedent for segregation?

Mr. SNYDER. Mr. Chairman, I think the court in *Brown* looked at the intent of the Fourteenth Amendment and the equal protection in a broader context that included, for example, the language

of the Fourteenth Amendment which calls for the equal protection of the laws, and the court looked at the practical effects of segregation in the United States and determined as a matter of fact, as

well as constitutional law, that separate but equal was not equal. They found, therefore, that the condition of segregation violated the basic intent of the Fourteenth Amendment for in fact providing equal protection of the laws to all our citizens.

I assume that the court looked at the records of the adoption of the Fourteenth Amendment to try to determine what was in fact the broader intent in that amendment, and obviously they looked at the record in front of them which included extensive expert and other factual analysis of what was in fact the effect in this country and the effect on our citizens of segregation. The Supreme Court obviously has the luxury that lower courts do not, Mr. Chairman. They can overrule prior Supreme Court precedent and found that *Plessy v. Ferguson* was wrongly decided in their opinion.

Senator SPECTER. Well, I take from your answer the key words of practical fact as being—would you say the practical facts were the critical issues which led appropriately to *Brown v. Board of Education* in disregarding the intent of the Congress and the ratifiers and the precedent?

Mr. SNYDER. Mr. Chairman, frankly, I am not familiar enough with the record that was in front of the Supreme Court in 1954 in terms, for example, of the historical record of the intent of the Framers of the Fourteenth Amendment. I do not know exactly what was in that record and exactly what the court reviewed.

I do believe that all courts in looking at constitutional issues should look at the language of the Constitution which in this case called for the equal protection of the laws which is a fairly straightforward phrase, and they should look at the intent of the Framers

and they should look to see whether on the record in front of them that constitutional protection is being met.

Senator SPECTER. Mr. Snyder, if you had a question of first impression where you did not have the guidance of the Supreme

Court of the United States, what methods would you employ in deciding such issues of first impression?

Mr. SNYDER. Well, in addition to looking obviously at the factual issues and the record in the case, I would look at the precedence in other courts or in analogous cases.

Mr. Chairman, in my almost 30 years of litigating, it has been very rare that there has been a case that is truly completely one of first impression. All of us lawyers that it is a case of first impression when we don't like the precedents that are out there, and

frequently there is no case directly in point, but as a lower-court judge, there are usually cases from the higher courts that, while not direct holdings that are precisely on point, do point the way doctrinally that the Supreme Court is asking the lower courts to follow. So there are analogous cases. There are cases that help a lower court to make a determination. There may be cases in other jurisdictions. I would look at those precedents as well as looking at the record and the individual case.

Senator SPECTER. Before yielding to Senator Biden and then to Senator Smith, I want to repeat to you a comment which was made by Senator Thurmond at the first nominating hearing that I attended in 1981, and this is for you, Mr. Snyder, Mr. Brady, Ms.

McLaughlin, Judge Schiller, Judge Surrick, and Judge Tucker.

Senator Thurmond asked the nominee, "If confirmed, do you promise to be courteous?," translated to if confirmed, do you promise to be courteous. And I thought to myself, what an absurd question, what do they expect the nominee to say, no, not to be courteous? Be courteous even if you are not confirmed.

The nominee said yes, and Senator Thurmond then said, "The more power a person has, the more courteous the person should be," more power a person has, the more courteous the person should be. I have considered that the most profound statement I have heard in this room, not much competition perhaps in the last 20 years, but the most profound statement I have heard. I always repeat that to nominees, and many have come back to me and have said, "I have thought about that," and there are, I think, a lot of occurrences.

I consider myself a practicing lawyer, and have noted many, many times that once those robes are donned, there is an aura of a difference. It may be impatience. You may have some lawyers who are unresponsive, and I do not think you are going to have too many lawyers who are as astute as you are, certainly very few who will have your record.

So I suggest that you think of Senator Thurmond if on any occasion you become short or quick or have the inclination not to be courteous.

Senator Biden.

Senator BIDEN. I concur with the notion of the profundity of the Senator's remarks. It really is. It is amazing.

We know it is a lifetime appointment, and we often joke that someone we appoint to the court, prior to their appointment, they are accessible and they are friendly and they are actually grateful to the President for having appointed them. After they are appointed, they wonder what in the hell took so long, why wasn't I

here all the time, and I guess I was born to be here. Not all, but some do, and I am confident from looking at your background that you do not fall in that category in any case.

I just have two questions. One, why do you want to be a judge?

Mr. SNYDER. Senator, I have felt very privileged for about 28 years to be participating in our legal and judicial system as a lawyer and an officer of the court. I really am proud of our system and

have been proud to be part of it. We have a legal system that I think is second to none in the world, a system where the will of the people and policy issues are decided by ballots rather than bullets, which is not the case in many countries around the world, and

where disputes among people are generally decided in a civilized fashion in courtrooms where people can have some confidence that

it is being decided in accordance with the law and based on impartial decisions and not based on power or prestige or the identity of

the parties.

I would be greatly honored to be a judge and to contribute further in the administration of justice in trying to give people the

sense that coming into a courtroom is a place where they will be

treated fairly, where the law will be followed, and I would like to contribute to that process.

Senator BIDEN. With regard to the questions that Senator Specter had asked you about defining what you mean by your definition

of being conservative, as I listened to what you had to say, basically what you are saying is those judgments on constitutional

issues where the Supreme Court has spoken are above your pay grade. You have no choice, right?

Mr. SNYDER. Yes, sir, that is correct.

Senator BIDEN. So your reading of stare decisis is that you are bound by the precedents that are on point of the Supreme Court decisions that you must look to. Is that correct?

Mr. SNYDER. That is absolutely legally correct, and I think morally correct, Senator.

Senator BIDEN. But as a Supreme Court Justice, a Supreme Court Justice is not so bound.

Mr. SNYDER. Yes, sir.

Senator BIDEN. I have no further questions.

Senator SPECTER. Thank you very much, Senator Biden. Senator Smith.

QUESTIONING BY SENATOR SMITH

Senator BOB SMITH. Thank you, Senator Specter.

Good afternoon, Mr. Snyder.

Mr. SNYDER. How are you, sir?

Senator BOB SMITH. I have a question that goes to the issue of advise and consent, and it picks up on what Senator Biden said. It is not directed at any specific case that you had. It is more generic, and it would apply to the other nominees as well. Unfortunately, I have to leave at 4:00, and I will not get the opportunity to question others.

You mentioned the Plessy v. Ferguson case. Obviously, I think as we would also agree with the Dred Scott decision which was never challenged, but the issue being in Dred Scott that an individual because he was black and was a slave, was property and therefore

could not sue. I think we would all accept that that was wrong.

However, had we been on the court then, we would have had to follow precedent until it was overturned.

If you were on something under the Supreme Court level, at one of the lower-court levels, Plessy v. Ferguson, I think applies that way. There would be many differences with me on this, but I would also apply the Roe v. Wade case there.

In any case, not going into that, but just on the issue of advise and consent, if you have a nominee where we are trying to legitimately determine whether or not a person would in fact be an activist judge who might make an outrageous decision if he or she were ever to get to the Supreme Court, it is true we do have another opportunity. If you are ever nominated to the Supreme Court

after this, we get a chance to question you again, but sometimes the water is running pretty fast and it is hard to stop it at that point. You may be rushed into the nomination.

In judicial activism, we have seen many epic battles. Senator Biden and Senator Specter have been involved in them. I remember the issue of Robert Bork, a conservative who was considered to

be an activist judge basically because he answered questions before the hearing. If you answer the questions, you get in trouble on either side. So you do not answer the questions. It would just seem

to me that without knowing that kind of information, and I am not saying you do, but if a judge has an activist record on the bench

in some of the decisions or an activist record prior to coming to the bench on some of his decisions, if we cannot ask you questions about that, how can we advise and consent in a way that would be meaningful to the process? I am speaking as a Senator. How do we do that? How can we advise and consent if we do not know what your views are on issues, not what your views are on a particular decision that might come up? You obviously cannot give us that, but your views on issues of importance?

Mr. SNYDER. Well, Senator, obviously I would not presume to advise the Senate on how to perform its constitutional duty, and the advise-and-consent duty is entrusted to the Senate in the Constitution with no provisos and no process of review. So it is obviously an important function, and I understand the question you are raising, Senator.

My sense is from my limited experience is that this committee has quite an elaborate process for reviewing candidates' records, and there is an extensive review process as to what people have done over their entire career. There is a review by the ABA as well as by the committee's investigative staff that asks questions about demeanor, about public statements, writings, what people have said to their neighbors, and I think that the committee does collect a great deal of information that probably gives you a pretty good sense of what kind of people you have in front of you and what they have done over the last 20 or 30 years which hopefully will allow you to make the kinds of judgments that you are referring to, Senator.

Senator BOB SMITH. But, generally, if I asked you today if separate but equal education was wrong, would you answer that question?

Mr. SNYDER. Well, as you know, Senator, one of the difficulties in this process-and I know you have looked at this question quite a bit and I understand the concern-the Senate is trying to get at all of the issues that you need to know in order to make the decision. The witnesses are trying their best to answer your questions, but obviously are constrained to some extent by the canons of judicial ethics which prohibit people from expressing personal points of view on issues that might come before them on the bench, and indeed, a judge who is doing his or her job properly would not in fact apply that personal point of view in ruling from the bench, whatever it was. They would apply the precedence in the case, but I do understand your concern.

If you could get every candidate to lay out their point of view on every issue of public policy, it would probably give you a further rounded picture of the candidate. Unfortunately, it might make the candidate unable to serve on the bench if they laid that out.

Senator BOB SMITH. A final question, Mr. Chairman.

Again, I think you are answering it honestly, but, again, from my perspective, if we were back prior to *Brown v. Board of Education* and we had the *Plessy v. Ferguson* decision and you were now coming to us as a nominee on the Circuit Court, however the decision has been made, if I were to ask you back then, do you agree with that precedent, I assume you have to say according to judicial ethics-your point is you have to say I cannot answer that question because I might be on the Supreme Court. But my problem with that is, if that is the way you would answer it-and maybe you would not-my problem with that is, okay, when you get on the Supreme Court, I would like to know whether or not

you view that

precedent as being valid or not, and if you do not, then that might impact how I might want to vote on your nomination.

Mr. SNYDER. Senator, I do not think I would have answered your question precisely that way if I had been before this committee 50 years ago.

I think I would have answered it the same way I am answering it today which is if I were nominated for a lower court, I would have said in answer to any question about whether I agree with Plessy v. Ferguson or any Supreme Court decision-I would have said if I were confirmed for this lower-court position, it would be my legal duty and I would in fact follow the Supreme Court precedent whether I liked it or not.

I do think that the question you are raising, Senator, is a harder question with regard to a Supreme Court nominee who has the right and power to overrule a prior Supreme Court decision. I think that may suggest that the standards and the questions perhaps raise different issues for Supreme Court nominees.

I am extremely honored to be here as a Circuit Court nominee. and I am trying my best to answer in that context, Senator.

Senator BOB SMITH. I understand. I am not trying to pin you, but my frustration is that is the way the Supreme Court nominees answer as well. They do not answer it either. So we do not know when we put somebody on the court, when we approve somebody. We do not know what they are going to do, which means it makes the advise-and-consent process very difficult, if not irrelevant. That is the point. It has nothing to do with you personally. I want to make that clear.

Thank you, Mr. Chairman.

Senator SPECTER. Thank you very much.

Senator BIDEN. May I-

Senator SPECTER. Senator Biden.

Senator BIDEN. I want the record to show, and I want the press to observe this, I agree with the Senator from New Hampshire. That will ruin his reputation, but I agree with you.

Senator BOB SMITH. Both of our reputations are gone.

Senator BIDEN. I absolutely agree. He is dead right.

I have had the misfortune or my students have had the misfortune of my teaching the advise and consent clause in the separation of powers course for the last 8 years in a law school in my State, and I have read, I think, everything that has been published and everything that has not been published on advise and consent.

The Senator is absolutely correct. It is totally within his power, and, Judge-and I hope you will be a judge-you would not be-no bar association, no judicial organization could keep you from

going to the bench if you answered every question specifically. The canons of ethics are no bar whatsoever for you answering any question asked as a Supreme Court Justice.

Now, you have a right not to answer what you do not want to answer, and we have a right if you do not answer just to vote against you because we do not like your answer. That is how all of it gets resolved.

So I think we would all be better served in the Senate by saying if they will not answer our questions, you just want to put them on notice at that time you are going to vote no.

Senator BOB SMITH. I have done that a few times.

Senator BIDEN. But, again, hopefully you will have that problem

and have time to think about it before you come back.

QUESTIONING BY SENATOR SPECTER

Senator SPECTER. One final question which comes to mind-your questioning will be a little longer than the district court judges.

You are going to a very, very important court. Circuit courts are important because they have really the final word absent review by the U.S. Supreme Court which is very rare, and the District of Columbia Circuit is especially important because you get the government cases.

It is, I think, the most important of the circuits. Next to a Supreme Court nomination, your nomination is that important.

When Chief Justice Rehnquist appeared before the committee, and you used to clerk for him, I had a very extensive dialog with him about the power of Congress to limit the jurisdiction of the court on constitutional issues. I ask you this question to test the doctrine of subordinate courts following Supreme Court.

If the case came before you, Congress had taken away the jurisdiction of the Supreme Court to decide constitutional questions involving First Amendment, freedom of speech, and the case of Ex Parte McCordle decided shortly after the Civil War upheld the power of Congress to take away the jurisdiction of the Federal courts on habeas corpus, would you follow Ex Parte McCordle?

Mr. SNYDER. Well, Senator, I pause because I really do not feel that I am a scholar in that particular area.

I actually-I remember taking Federal courts in law school, and I remember reading a lot of cases that dealt with the related issue. It seemed to me at the time to be a somewhat unclear area of the law, and it has not become clear in my mind in the last 30 years not having studied it further.

If that issue did come before me, obviously what I would do first is to look at all the precedents from the Supreme Court. The Constitution, of course, does specifically give the Supreme Court certain specified jurisdiction and then talks about such inferior courts as the Congress shall establish.

Senator SPECTER. Does the Constitution give the Supreme Court the authority to overrule acts of Congress?

Mr. SNYDER. Not explicitly in the Constitution. The Marbury v. Madison decision obviously was where that power first was declared.

I am not trying to not answer your question, Senator. I think the kind of question-

Senator SPECTER. This is one question you cannot answer without having your confirmation in any jeopardy.

Mr. SNYDER. What I am saying is I am trying my best to honestly state that I do not know the answer without looking carefully

at all the precedents which I just do not have in my mind, but if I did have a case raising that issue, I would look at the language of the Constitution. I would look at the precedence of the Supreme Court, and I would try to follow them.

I am not sure I can answer the question any better than that sitting here today.

Senator SPECTER. If you want to find Chief Judge Rehnquist's answer, check the record.

Mr. SNYDER. I am sure it was a good answer.

Senator SPECTER. I will not tell you what it is. His answer to that question was a good answer, but his answer to the question as to whether Congress had the authority to take away the jurisdiction of the Supreme Court on Fourth Amendment issues was not

quite so good, nor was his answer to the question as to why he would answer the questions to the First Amendment, but not the

Fourth Amendment.

Well, we have kept you a long time, but I think that you are heading for a very important court. While prediction is not my business generally, I think you will be confirmed, and we wish you the very best.

Mr. SNYDER. Thank you very much, Mr. Chairman.

Senator SPECTER. I know your family is very proud of you, especially your 91-year-old father who is sitting beside you. If Senator

Thurmond were here, I know he would say that young fellows like your father have a lot to be proud of.

Mr. SNYDER. Thank you, Mr. Chairman.

Senator SPECTER. Thank you very much, Mr. Snyder.

Do you know that Circuit judges make more than Senators?

Mr. Snyder, did you know that?

Mr. SNYDER. Clearly inappropriate, Mr. Chairman.

[Laughter.]

SONIA SOTOMAYOR
TUESDAY, SEPTEMBER 30, 1997
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 3:02 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Mike DeWine presiding. Also present: Senators Hatch, Thurmond, Thompson, Torricelli, Sessions, and Ashcroft.

OPENING STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. I would invite my colleagues, I see Senator Glenn and Senator Bennett, to come immediately to the table. We are now proceeding to hearings for two circuit court judges and five district court judges. We need to be out of here by 4:30 p.m., which I assume we can be.

I would say to all of the prospective judges who are here that it is certainly possible that we may submit some written questions for the record, either because we run out of time or because some members are not here. Some members may have to leave, so you should be prepared to receive written follow-up questions from them, as well.

Let me turn now to our colleague from the State of New York, Senator D'Amato.

STATEMENT OF HON. ALFONSE M. DAMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator DAMATO. Thank you very much, Mr. Chairman. Might I ask that as I introduce the nominees, they have an opportunity to come forward.

First, it is my pleasure on behalf of both myself and Senator Moynihan, who has submitted an extensive statement, and let me just read a little part of it. He said today is a great day for New York, and he talks to the honor and privilege it is for him to put forth and join with me in support of three of the wonderful nominees that will be before this committee.

Second, Judge Sotomayor, who comes before the committee for the second time. It was less than 5 years ago when the judge was nominated for the southern district, a position that she has held now for almost 5 years and she is now nominated to one of the most important courts in the land, the Courts of Appeals, Second Circuit.

Were it not for Senator Moynihan feeling somewhat under the weather, as he has a heavy, heavy cold, he would be here. I ask that his statement be inserted in the record as if read.

Senator DEWINE. His statement will be made a part of the permanent record.
Senator Torricelli.

Senator TORRICELLI. Mr. Chairman, I had three statements from him. Senator D'Amato, do you have all three statements from Senator Moynihan?

Senator DAMATO. Yes; all three of them, and that is why I wanted to characterize his statement as this being a great day for the judicial system of this country, but particularly as it relates to these three magnificent individuals.

Senator DAMATO. Let me say, I am going to ask that my full statement be included in the record as if read in its entirety, because I have these loquacious speech writers who have

gone into

every detail of all of the candidates and their lives. Some, they might want to hear. Others would be-well, no.

Senator DEWINE. It will be made a part of the record.

As it relates to Justice Sotomayor, what can one say? But only in this country, the daughter of a humble working family has risen by way of her legal scholastic stewardship to the highest trial court in the Federal district, the premiere district, I might add with some prejudice, the Southern District of New York, where she has distinguished herself.

I predicted to this committee almost 5 years ago that Judge Sotomayor would be an exemplary, outstanding justice. She has demonstrated that repeatedly. She has shown compassion, wisdom, one of the great intellects on the court. Her experience both as a prosecutor, civil litigator, and Federal trial judge makes her an exceptionally qualified candidate for the second circuit. She is here

with her beautiful mama, and I am wondering if we could have your mother stand. Mrs. Sotomayor, congratulations to you.

Mr. Chairman, it is a great honor to recommend these three nominees and join with our senior Senator in presenting them to the committee today.

Senator DEWINE. Senator D'Amato, thank you very much for joining us.

We will now proceed with our circuit court

nominees. I would ask our two nominees to come forward. We apologize for moving everyone around, but I think that we will proceed with two panels, starting with the circuit court nominees.

As you come up, I will just ask you to remain standing and take the oath. Do you swear the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Judge SOTOMAYOR. I do.

Senator DEWINE. Thank you both for joining us today.

Senator Thurmond.

QUESTIONING BY SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman. Judge Sotomayor, a former Supreme Court Justice has expressed his view of constitutional interpretation as follows, and I quote, "We look to the history of the time of framing of the Constitution and the intervening history of interpretation, but the ultimate question must be, what do the words and the text mean in our time?" Do you agree with that statement?

TESTIMONY OF SONIA SOTOMAYOR, OF NEW YORK, TO BE U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT

Judge SOTOMAYOR. No, sir, not fully. I agree with the first two parts of it, that you look at the Constitution and what it meant at the time. The last suggests that I would be trying to change its meaning today, and no. I think the first two would inform what the last result should be, which is what did it mean then and how to apply new facts to that if the issue is new facts.

Senator THURMOND. Now, this question is for both of you. You have both had some involvement with the American Bar Association. Do you believe that the ABA should take positions on social

and public policy issues such as abortion and aid to the homeless?

Judge SOTOMAYOR. I have only been an inactive member of the

bar. I joined it largely because of its educational importance. The American Bar Association regularly issues studies on the current state of the law and analysis of where the law is and what is happening in that area and I receive their publications and receive them for that purpose.

I am aware, obviously, as any reader of newspapers, that they have taken larger positions on social issues. I believe, like Mr. Gilman, that that perhaps would not be terribly helpful to them generally because it undermines their effectiveness on the central issues of their mission, which is the education of lawyers.

Senator THURMOND. This question is for you. It is a sad fact that many young people get involved in selling drugs. Based on your experience as a judge, why do you believe many young, poor youths become drug dealers?

Judge SOTOMAYOR. Senator, I wish I had the answer. If we had the answer, we would have a solution to one of the worst ravages on our society, drugs, and I do not. The reason why kids become in drugs, as I have learned as a judge, vary enormously. Some, because of the lure of easy money, something that perhaps they should not be tempted by, but they are. Others, through their own self-ignorance about the damage they are doing to society and to themselves. I simply do not have one reason I can give you. The reasons are myriad and complex.

Senator THURMOND. Now another question. Do you oppose mandatory minimum sentences for drug offenses?

Judge SOTOMAYOR. No, sir.

Senator THURMOND. Another question. Some argue that the Federal sentencing guidelines do not provide enough flexibility for the

sentencing judge and some even say they should be abolished.

What is your view of the Federal sentencing guidelines, based on your experience with them?

Judge SOTOMAYOR. Thus far, sir, in the vast majority of cases, I have found the guidelines to be very helpful in giving some comfort to me as a judge that I am not arbitrarily imposing sentences based on my personal feelings. I believe that congressional sentiment, as reflected in the guidelines, is important because it permits

me not to impose my personal views but to let the democracy impose the society's views.

With respect to your second point, Senator, the guidelines already provide mechanisms for departures in appropriate circumstances. In my experience, when there are principled and reasoned grounds to depart, the guidelines already permit it.

Now, there is obviously discussion going on, I am very well aware of it, of issues that the Senate is taking up on changes within the guidelines with respect to some kinds or others or with respect to some issues or other. I expect, as has happened during the last 10 years, that the Sentencing Guideline Commission will continue to take up those issues and revisit them when they are appropriate.

Senator THURMOND. Thank you both for your presence and your testimony.

Senator DEWINE. Senator Sessions.

Senator SESSIONS. Judge Sotomayor, would you agree that if we respect that Constitution, we have to enforce it, the good and bad parts?

Judge SOTOMAYOR. Absolutely, sir.

Senator SESSIONS. Even if we do not agree with a part of it?

Judge SOTOMAYOR. Absolutely.

Senator SESSIONS. And we really undermine and weaken that Constitution when we try to bend it to make it fit our contemporary feelings of the moment?

Judge SOTOMAYOR. Sir, I do not believe we should bend the Constitution under any circumstance. It says what it says. We should do honor to it.

Senator SESSIONS. And when we honor it as it is written, I think we strengthen it and make it available to protect us when any great threat to our liberty arises. I agree with you on that.

You mentioned the sentencing guidelines that Senator Thurmond asked you about. I did notice that you had, on occasion, stated that you disagree with the mandatory minimums. Is that correct? I have heard that.

Judge SOTOMAYOR. Sir, I do not ever remember saying that. There may have been situations in which in a particular set of facts I was unhappy with the results, but I do not believe that I have ever stated that I was unhappy with mandatory minimums as a policy question, no, sir.

Senator SESSIONS. I think you made a good point about the fact that, as a judge, it would be easier to sleep at night when you basically have a guideline to help you decide what that sentence should

be rather than having it totally your burden from 0 to 20 years.

I think, in some ways, it provides more uniformity and would be easier on a judge.

Judge SOTOMAYOR. Unquestionably, sir.

Senator SESSIONS. Do you find it that way?

Judge SOTOMAYOR. I have no idea how the judges before me ever set a consistent standard by which to sentence individuals. The guidelines do provide that framework in a very helpful way.

Senator SESSIONS. I have been in court when I thought a person might get probation and they got 15 years and vice versa. I think something is not healthy when you have that much flexibility.

So I do believe in the guidelines and I think in the long run they are helpful, but I do notice in one case that you issued a sentence and you were very critical of the guidelines and said, "I hope that yours," referring to, I believe, Louis Gomez's case, "will be among the many that will convince our new President and Congress to change these minimums. The only statement I can make is this is one more example of an abomination being committed before our sight. You do not deserve this, sir. I am deeply sorry for you and your family, but the laws require me to sentence you to the 5-year minimum. I have no choice." Would you like to comment on that?

Judge SOTOMAYOR. Sir, that is a case where the facts and my personal feelings would have imposed a different result, but I did not. I imposed what the law required. If that is-I am sorry, the name of the case is?

Senator SESSIONS. I think it was Louis Gomez.

Judge SOTOMAYOR. Can you tell me how far back that case was, sir?

Senator DEWINE. Ninety-three.

Judge SOTOMAYOR. If I am not mistaken, sir, that was before the safety valve provisions that were passed by Congress and I believe, and I could be completely mistaken, because it has been a very long time and I have had many sentences since, that I may have been talking about the mandatory minimums more than the guidelines in a first offense-exactly what Congress later did, which was

to say, in a first offense situation with someone who is willing to

cooperate, as that gentleman was but had nothing to give and he has no history of violence and none was used, that you could depart from the guideline minimums in that regard, or lower them.

So I may be mistaken, sir, but I do believe that that was the situation and that Congress did do what I had earlier stated, which

was to look at the factual situations and the impact and make changes when they are appropriate.

Senator SESSIONS. I think the Congress should do that and I do not disagree with the judge calling on Congress and suggesting that they should consider making any changes in the law. However, I do think that a judge, would you not agree, has to be careful

in conducting themselves in a way that reflects respect for the law and the system?

Judge SOTOMAYOR. Absolutely, but-

Senator SESSIONS. A second guess about-

Judge SOTOMAYOR. Maybe I would not have called it an abomination, but I was thinking more of the factual outcome in that case.

But no question that all I meant in the context of that case was the facts of that particular case, which Congress did come very shortly thereafter to change. So, obviously, my strong feelings were reflected sufficiently that Congress-not because of me, obviously, I doubt they knew who I was at the time and may not all know who I am now-but it was because of the hardships that were created in many situations that caused the safety valve provision to be passed.

I do agree, however, that great respect both for the law and for the process is terribly important, and as I underscored there, I do what the law requires and I think that is the greatest respect I could show for it.

Senator SESSIONS. It is important to follow the law, though, in cases like this, had you not, it would have been reversed. But I think that perhaps had you expressed your criticism with the skill you have done today, it might be a little better conduct for a judge.

I just think that, as you know, when you set a standard of guidelines, everybody is not going to fit perfectly within it and maybe

you have a responsibility to help that defendant to understand that, though it may be unfortunate and you personally would not have given as much, that there is a rationale to this law.

Judge SOTOMAYOR. I have done that on numerous occasions, Senator, and there, it was very shortly at the time that I took the

bench and I believe that since then, I have always been very careful, and I say it repeatedly at sentencing. When I am faced with

emotionally difficult situations for defendants and their families, often, I get a lot of letters from heartbroken family members and at sentencing, I explain to them that as much as I understand their pain, that I have a greater obligation to society to follow the law in the way that it is set forth.

Senator SESSIONS. One more thing. I noticed a New York Times article that indicated that you had not applauded or not stood and applauded when Justice Thomas appeared at the second circuit conference. Are you aware of that?

Judge SOTOMAYOR. Well, I never did say that, sir. I took the fifth amendment when the New York Times asked me that because of the raging controversy at the time. I thought it made no sense for

a prospective nominee to enter that kind of political fray by any statement, but I do not think I ever did, sir.

Senator SESSIONS. Well, that might explain it. The question in the article was, when Justice Clarence Thomas was introduced at the second circuit conference, the question of the reporter was, were you among those who sat on her hands rather than giving him a standing ovation, and you said, "I will take the Fifth."

Judge SOTOMAYOR. I explained to her clearly, as I do to you now, I did that because I thought as a-at that point, I was a confirmed nominee, and as a judge, that I should never be making political statements to the press or anyone else and I thought that was a politically charged question.

Senator SESSIONS. Let me just ask you, did you see fit to stand and applaud when he-

Judge SOTOMAYOR. He was my Supreme Court Justice of my circuit. I stood up.

Senator SESSIONS. Thank you very much, Mr. Chairman.

Senator DEWINE. Senator Ashcroft.

QUESTIONING BY SENATOR ASHCROFT

Senator ASHCROFT. Thank you, Mr. Chairman. I appreciate the opportunity.

Judge Sotomayor, at one time, you were

asked to rule on a case of a prisoner who was removed from his food service job in prison because he was an open homosexual. The plaintiff sued under the 1983 provisions, arguing that prison officials violated his constitutional rights by transferring him from the

food service job. Prison officials argue that he was reassigned from his food service job to prevent disciplinary problems that could arise from having open homosexuals prepare food.

You denied the motion for summary judgment on procedural grounds, but you wrote that a person's sexual orientation, standing alone, does not reasonably, rationally, or self-evidently implicate mess hall security concerns. You ruled that prison officials did not present evidence that having homosexuals prepare food was a real threat.

I wonder, as a Federal judge, how much difference-

Judge SOTOMAYOR. Sir, may I just interrupt one moment, and I apologize greatly. It was not a motion for summary judgment, it was a motion to dismiss, which has a different standard. So I am somewhat surprised when you say that I criticized them for not producing evidence, because on a motion to dismiss, they do not produce evidence. I have to take the prisoner's allegations on their face. And I am sorry. I did not know if that affected the premise of your question.

Senator ASHCROFT. I am going to find out here in a minute. I guess what I really want to know is, what level of deference does a Federal judge owe to prison officials when trying to figure out what security risks there are in a prison?

Judge SOTOMAYOR. Enormous. It is a rational basis, which means any government interest, as long as there is a reasoned, rational basis for it and it is not arbitrary and capricious, the prison officials can do what they like.

In that particular case, sir, as I said, it was a motion under 12(b)(6)-I believe it is 12(b)(6). It could have been 12(b) (6) or (5).

But under either, you take the plaintiff, in this case, the prisoner's facts as stated. You do not in any way pay attention to what the

defendants are saying. You take just the pleadings, and the pleadings in that case alleged that there was-the plaintiff claimed that there were no security threats against overt homosexuals whatsoever, that he was not aware of any threats, none had been directed in prison.

The reason I know this case so well, Senator, is I just tried it last week and it turned out the jury found in favor of the prison guards because there was one fact there that was slightly different. The prison claimed that it never removed him from the food line. That was a factual dispute between them. They say that they asked him to leave and that he consented to leave because of the threats that had been made. And, in fact, the jury credited the prison guards on that claim and held for the defendants.

Senator ASHCROFT. You say you just tried this case last week?

Judge SOTOMAYOR. Yes.

Senator ASHCROFT. Is this on a second appearance before you, then? Is this the Holmes v. Artuse?

Judge SOTOMAYOR. Holmes v. Artuse.

Senator ASHCROFT. I had that as a 1995 case. Am I mistaken?

Judge SOTOMAYOR. It was. What happened, sir, in that case, is if you notice my-because it was a motion to dismiss, I had invited pro bono counsel to take on the case. They came on it later, I do not remember exactly when, and we just got it to trial last week.

Senator ASHCROFT. What was the outcome of the case?

Judge SOTOMAYOR. As I said, the jury found for the defendants on the initial question, which is that the prison had not removed him without his consent, that he had, in fact, consented to the removal. But those are issues of fact that a judge cannot decide on

paper, sir. Those are factual questions always for a jury. Did X or Y happen?

Senator ASHCROFT. I think those are evidentiary questions.

Judge SOTOMAYOR. Exactly. Exactly.

Senator ASHCROFT. I guess it is possible that a judge can decide evidentiary questions in the absence of a jury, though.

Judge SOTOMAYOR. Well, in some circumstances.

Senator ASHCROFT. Do you believe that there is a constitutional right to homosexual conduct by prisoners?

Judge SOTOMAYOR. No, sir; there is not. The case law is very clear about that. The only constitutional right that homosexuals have is the same constitutional right every citizen of the United States has, which is not to have government action taken against them arbitrarily and capriciously. The Supreme Court said that last term in *Evans v. Romer*. But outside of that, that is a basic constitutional right, not to them in particular, but to the world that constitutes the United States.

Senator ASHCROFT. Do you think there should be one, a special constitutional right?

Judge SOTOMAYOR. I do not think that we should be making constitutional rights any greater than they exist right now. The Constitution should be amended sparingly, sir, as it has been throughout our history. It is something that should be done only after much history and much thought.

Senator ASHCROFT. Do you agree with the amendments that have been made to date?

Judge SOTOMAYOR. Yes, sir. It is a document that I live by.

Senator ASHCROFT. I agree with them and I think it was good that they were amended, so I accept the process. So in your judgment, you would not read additional rights into the Constitution,

like a right for homosexual conduct on the part of a prisoner?

Judge SOTOMAYOR. I cannot do it, sir. I cannot do it because it is so contrary to what I am as a lawyer and as a judge. The Constitution is what it is. We cannot read rights into them. They have

been created for us.

Senator ASHCROFT. Are there any rights that are not protected by the Constitution that, as a matter of policy, you would like to see protected?

Judge SOTOMAYOR. I have not thought about that in a while, sir. No.

Senator ASHCROFT. My time is not up.

Judge SOTOMAYOR. I think I answered.

Senator ASHCROFT. In your opinion, do you think Congress has the right constitutionally to restrict the jurisdiction of lower Federal courts?

Judge SOTOMAYOR. You know, I have not examined that question in the longest time, but I cannot-I am not thinking-we were created by legislation of Congress, so I would think that if Congress

created it, Congress can take it away. What you cannot do is take away that which the Constitution would give the courts. I think that was established in *Marbury v. Madison*. But absent that, not looking at the question or studying it in depth, I cannot give a better answer than that.

Senator ASHCROFT. I thank you, Chairman DeWine. Thank you.

Senator DEWINE. Judge, one of the great burdens of being a Federal district court judge must be to deal with prisons. I have a little

familiarity with that. When I was Lieutenant Governor in Ohio, one of my jobs was to oversee our prison system-so I have a great deal of sympathy with judges who have to deal with the litigation, and there is a tremendous amount of litigation.

I say that and preface it by way of an apology because I am going to turn to one more prison question, if I could. I do not have a name for this case, but I suspect you will recall it. The date I have is 1994 and the issue was multicolored necklaces under the clothing of prisoners. Do you remember the-

Judge SOTOMAYOR. Yes, I do.

Senator DEWINE. So you remember the name of the case?

Judge SOTOMAYOR. It is my *Canpos* case. It is better known as the *Santorea beads* case, or at least colloquially known that way, I should say.

Senator DEWINE. My understanding is that there was a dispute involving the wearing of these beads. Again, I am going to summarize and you can correct me and then tell me a little bit about the

case. What I am trying to get at is how you reason as a judge.

My understanding is that prison officials argued that the beads were gang symbols that provoked fights. Contrary to that, I assume the argument is the religious freedom question. Do you want to walk through for me how you balance that, and ultimately, do we get back to what we were just talking about a minute ago, a factual question?

Judge SOTOMAYOR. In that case, sir, yes, prison officials had taken the position that the wearing of beads of colors were a symbol of gang membership. The prisoners, in turn, had asked the prison officials to permit them to wear the beads under their shirts as opposed to visibly. So the question for me was, was it rational for

the Government not to permit that alternative when I was balancing a religious right against a security concern. The Supreme Court in these cases has held that you must give heightened deference to prison security concerns and other concerns but that prisoners do not lose fundamental rights, like religion, in prison, and so that unlike the standard rational basis review that is given—this is before the Religious Restoration Act,

Senator, it is not a part of the jurisprudence tied to that—
Senator DEWINE. I understand.

Judge SOTOMAYOR. The Court has said that it is a slightly different review in that context, that the context there is that you

must balance as a judge the security concerns with readily accessible alternatives. There is no bright line rule, but there, unlike the

traditional rational basis test where you take as a presumption

that the Government is doing what it thinks is right, that is a jury

or a factfinder, you must weigh whether there are reasonable alternatives that could be just as effective.

My reasoning in that particular case, as the opinion stated, was

that, in essence, hiding the beads was a reasonable alternative because it could not show. I do not know if in the opinion, but I know

when I spoke to the prison officers later, I said to them, if it turns

out that they are finding ways to evade that, then, obviously, you

can take steps that are different. But until that was tried first, because it was a reasonable, inexpensive alternative and not terribly

costly, that I felt that that was consistent with Supreme Court

precedent on this area.

Senator DEWINE. I appreciate your explanation. Let me move to

one final case, the 1993 Gonzalez case. Let me quote you in that

case. "We understand that you," referring to the defendant, "were

in part a victim of the economic necessities of our society, but unfortunately, there are laws that I must impose." Do

you recall that

case at all?

Judge SOTOMAYOR. Not much, sir.

Senator DEWINE. I understand that, because we sit up here and

we can look at all your cases and you have to try on the spot to

remember a case that may have occurred, in this case, 4 or 5 years

ago, so—

Judge SOTOMAYOR. I have had two or three Gonzalez cases, and

I cannot, meaning not the same defendant, but different ones—

Senator DEWINE. Let me give you the additional facts, and if it

refreshes your memory, fine, and you can tell me about it. If it does

not, we will just move on.

My understanding is that Gonzalez had been convicted of constructively possessing at least 600 grams of cocaine. He exercised

dominion and control of an apartment in which the cocaine was

found. He also stated he knew someone else was supposed to pick

up the cocaine to sell it and distribute it to others. Do you recall

anything about that?

Judge SOTOMAYOR. No.

Senator DEWINE. OK. That is fine.

Judge SOTOMAYOR. I am terribly embarrassed to say that that

fact situation is also extraordinarily common—

Senator DEWINE. And I can understand that. I appreciate it.

Thank you.

Any other questions from any members of the committee? Senator Sessions?

Senator SESSIONS. I would like to ask—

Judge SOTOMAYOR. If you would like to—I am sorry, Senator.

Senator DEWINE. No, go right ahead, Judge.

Judge SOTOMAYOR. If you have a question generally about something I might have said, perhaps I-

Senator DEWINE. I think it is difficult, frankly, if you do not recall. I think it would be unfair to you to ask you anything further

about that, if you do not recall it.

Judge SOTOMAYOR. Thank you, sir.

Senator DEWINE. Senator Sessions.

Senator SESSIONS. You mentioned that you appointed pro bono counsel in this prison case?

Judge SOTOMAYOR. We do not appoint them, sir. There are no funds to appoint counsel in civil cases, as you may know. What we do is put the case on a pro bono list, which is made up of volunteer lawyers, and the volunteer lawyers decide whether they want to take the case or not. So if I used the word "appoint" the lawyer there, what it means, in essence, is putting them on the list so that they are eligible to get a lawyer from that volunteer list if a lawyer chooses to take the case.

Senator SESSIONS. Those turn out to be often very expensive processes. Sometimes it is easy for a judge to call in a lawyer and then charge him to take a case-I am not saying you did, but I have seen that before-but the State has the expense of going through this whole process, which went on from 1995 until, I guess, just last week. A lot of expense goes into that. I think we have got to learn to do a better job.

Judge SOTOMAYOR. Senator, if I may add, I put people on a pro bono list very, very rarely. I am on the pro se committee of our court. I do it only when, generally, after some discovery has happened so I can take a look at what is there and determine whether

there is some substance to the claim, and not initially in all cases, and where there may be a complex legal question.

For example, in that case and a few others, in that *Holmes v.*

Artuse, where I did that, the Supreme Court was just considering an equal protection claim that I mentioned might elucidate this area. In a case like that, where there is an unsettled legal question, and you can define that by something where the circuits are split or the Supreme Court is hearing an issue, then I will usually ask for a lawyer because then the questions are so complex that one needs some help in terms of making sure that you have thought of all the arguments. You want the lawyers and not a pro se prisoner to brief them.

Senator SESSIONS. Thank you.

Judge SOTOMAYOR. Senator, may I take just half a second just to introduce my mother again and my fiance?

Senator DEWINE. I think that is very appropriate.

Judge SOTOMAYOR. My mother, Celina Sotomayor, is here, and my fiance, Peter White, and respecting your time, I will not introduce individually all of the wonderful supportive friends I have

here, other than my godson, who is a Boy Scout.

Senator DEWINE. Let us have the godson stand up, then.

Judge SOTOMAYOR. Tommy John Butler. He is the back standing up.

Senator DEWINE. He is standing up anyway. Thank you very much.

Judge SOTOMAYOR. Thank you.

Senator DEWINE. Thank you very much.

Let me just make kind of a personal comment. As the father of eight kids, I have rarely seen children so quiet. We have a room full of children here and I congratulate all of you for staying with us.

CHESTER STRAUB
WEDNESDAY, APRIL 29, 1998
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:06 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Mike DeWine, presiding.

Also present: Senator Feinstein.

OPENING STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR
FROM THE STATE OF OHIO

Senator DEWINE. Good afternoon. We will begin the hearing with our first panel. This is a Judiciary Committee meeting on judicial nominations. We have four nominations in front of the committee today: William Fletcher, of California, nominated to be U.S. circuit judge for the Ninth Circuit; Chester J. Straub, of New York, to be U.S. circuit judge for the Second Circuit; William P. Dimitrouleas, of Florida, to be U.S. district judge for the Southern District of Florida; and Judge Stephan P. Mickle, of Florida, to be U.S. district judge for the Northern District of Florida.

Senator Moynihan, we will start with you.

STATEMENT OF HON. DANIEL PATRICK MOYNIHAN, A U.S.
SENATOR FROM THE STATE OF NEW YORK

Senator MOYNIHAN. Well, thank you, Mr. Chairman. And I have with me my dear friends and colleagues, Chairman Gilman, from the House and Senator D'Amato. We are here on behalf of Chester Straub. Chester Straub and Representative Gilman entered the New York State Assembly as colleagues together in 1974.

This is a great honor for us, and a pleasure particularly for me.

Chester Straub is one of the most distinguished members of the New York Bar and has been recognized as such for many, many years. He has been for 22 years chairman of the Judicial Selection Committee which I established upon arriving here, just as Senator D'Amato has established one. He was also chairman of the Judicial Selection Committee for Governor Cuomo for many years.

He was a member of the assembly of New York State and a New York State senator. He has been active in civic causes of a great

range. I won't burden you more than to report he was on the Cardinal's Committee for the Laity for Catholic Charities of the Archdiocese of New York, which is a very prominent and important position.

He is a former first lieutenant in the U.S. Army Intelligence Corps and a graduate of the University of Virginia. I commend him with the utmost confidence to this honorable committee.

Senator DEWINE. Chairman Gilman.

STATEMENT OF HON. BENJAMIN A. GILMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF
NEW YORK

Representative GILMAN. Thank you, Mr. Chairman, Senator Feinstein. It is a pleasure to be able to appear before the Senate Judiciary Committee along with my distinguished Senators from New York: the senior Senator, Senator Moynihan, and the junior Senator, Senator D'Amato. And it is my honor and privilege to be able to be here on this occasion on which you are considering Chester J. Straub, nominee for the U.S. Court of Appeals for Second

Circuit of New York.

Through my own experience of having worked closely with Mr.

Straub as a colleague in the New York State Assembly, I have come to know him as a dedicated, hard-working public servant and an excellent legislator, capable of organizing his own legislative initiatives in a very proficient manner and of expressing those initiatives in a clear and concise manner.

Through his 6-year tenure in the State assembly, he served as the chairman of the Democratic Policy Committee, a member of the judiciary, ways and means, and ethics and guidance committees in the State legislature. He has also served as a member of the New York State Senate and as a special master assistant to the New York State Supreme Court and as a member of Governor Cuomo's statewide judicial screening committee.

Currently, he serves as both a mediator and as a neutral evaluator for the U.S. District Court of New York and as a member of

Senator Moynihan's judicial selection committee, as the good Senator pointed out.

As a litigation lawyer specializing in regulatory agencies and governmental affairs, Mr. Straub gained admittance to the New York State Bar Association in 1962 and has argued cases before the U.S. Supreme Court and various other Federal courts across our Nation.

He has also been a partner in New York City's renowned firm Willkie, Farr and Gallagher since 1971 and was an associate with that firm from 1963 to 1972 and has made an ongoing contribution to the people of New York, and I am certain the high levels of success which he achieved throughout his public service career will

continue to yield substantial rewards in all of his future endeavors.

Once again, it is my privilege to be here with Chester Straub and with our good Senators from New York.

Senator DEWINE. Chairman Gilman, thank you very much.

Senator D'Amato.

STATEMENT OF HON. ALFONSE DAMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator DAMATO. Mr. Chairman, Senator Feinstein, let me ask that my statement be placed in the record as if read in its entirety.

Senator DEWINE. It will be made a part of the record.

Senator DAMATO. I will simply echo the sentiments expressed so eloquently by the senior Senator from New York and my distinguished friend and colleague, Congressman Gilman, chairman of

the Foreign Relations Committee, who has had the opportunity to work with Chester Straub personally as a legislator, and one of the most gifted and talented legislators.

To bring to the court the experience not only in legislation but in terms of legal practice as an outstanding practitioner of the law, Chester Straub will add to the very strong bench that we do have in the Federal court and the Second Circuit in particular. So I am very pleased to make that recommendation and also to point with a great deal of pride, as Senator Moynihan has mentioned, to the fact that he has done a tremendous job as chairman of the judicial screening committee, and that is a committee both Senator Moynihan and I take great pride in, because, as you know, we are, I

think, the only State where we share the nominations regardless of who is the President. We have worked out an agreement now that carries into--we have been doing this for 18 years. And so our committees, we value the opinion and the leadership of each other's committee, and we work very, very closely. And I have had that opportunity to observe Chester Straub and the

committee in the work that he has done for this country, for Senator Moynihan, in putting for the caliber of nominees that we have come forth with.

So I am tremendously pleased to be able to second this nomination on behalf of our State, or third it, and I certainly recommend him to this committee.

Senator DEWINE. Well, we appreciate your testimony, all three, of you, very much.

Senator MOYNIHAN. Thank you, Mr. Chairman. Thank you, Senator Feinstein.

Senator DEWINE. Thank you.

I would invite our four nominees to come up at this point and remain standing, and I will swear you all in at the same time.

Please raise your right hand. Do you swear the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. STRAUB. I do.

Senator DEWINE. Mr. Straub.

TESTIMONY OF CHESTER J. STRAUB, OF NEW YORK, TO BE U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT

Mr. STRAUB. Thank you very much, Mr. Chairman. First, I would wish to express my appreciation to the Chair and Senator Feinstein and all the members of the Judiciary Committee for extending me this courtesy and having me appear before you today. I am especially grateful to Senators Moynihan and D'Amato and my former State legislative colleague, Congressman Gilman, for their kind words.

With the Chair's permission, I would like to take a moment to introduce my spouse, Patricia, and my eldest son, Chester, Jr., who are with me today. Chet, Jr., if I may say, is a Deputy Assistant Secretary of Commerce here in Washington. Our other three sons, unfortunately, could not join us. Michael is practicing law in Vermont. Christopher, an investment banker, is with A.G. Edwards in

Missouri. And Robert is a resident physician, toiling in the obstetrical wards of Lennox Hill Hospital. As well as our three daughters-in-law, Erin, Anne, and Dorothy, all of whom for their own professional reasons could not be with us today, and I regret that, but

I appreciate the opportunity of referencing them.

I have no formal statement, Mr. Chairman.

Senator DEWINE. I want to ask a series of questions that I would like each one of you to address. I will start with Mr. Fletcher. These are fairly routine questions, and sometimes people may wonder why these questions are asked. I think that it is necessary to ask them, even if we can pretty much figure out what your answers are going to be.

I think it is important to have it on the record, and I think it is important in a public hearing to have these questions asked and answered.

The first question, again, I would start with Mr. Fletcher, and we will just go right down the line. Are you committed to following Supreme Court precedent and the rulings of the Federal Circuit Court of Appeals for your district faithfully in giving them full force and effect even if you personally disagree with such precedent or rulings?

Mr. STRAUB. Yes. Without question, Mr. Chairman.

Senator DEWINE. What would

you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you, nevertheless, apply that decision or your own best judgment of the merits?

Mr. STRAUB. As would I, Mr. Chairman.

Senator DEWINE. Let me ask one more question, and then I will turn to Senator Feinstein. As a judge, would you be bound by the Supreme Court precedent and the rulings of the Federal Circuit Court of Appeals for your district? There may be times, however, when you will be faced with cases of first impression. What principles will guide you, or what methods will you employ in deciding cases of first impression?

Mr. STRAUB. Mr. Chairman, I would begin by having two principles overall in mind. Were I faced with a constitutional issue, the

status of the Constitution would have to be considered. Were it to be simply a statute, I would have to accord its primary meaningful effect, and obviously have to give it, in the first instance, a presumption of constitutionality.

I have found in my practice, as Professor Fletcher has indicated, that there is rarely something of totally first impression. In most instances, there are two lines of authority somewhere running alongside the issue, which is presented for decision at the moment. So that, there is something to be had from one or the other of those line of cases, so as to be able to decide the issue before one, as well as to harmonize the law for the continuation of the development of precedent.

When there are not such two obvious lines, there is some analogous authority which offers some assistance. In all of these instances, I would keep in mind the absolute necessity of looking for some precedent in order to be able to assure the community, lawyers and litigants alike, that there is definitiveness to the law in

our circuit so that there might be certainty in their litigation.

Senator DEWINE. Thank you very much.

Senator Feinstein.

QUESTIONING BY SENATOR FEINSTEIN

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Senator DEWINE. Do you believe that the court should establish a finish line, so to speak, in ending school busing decrees; for example, at the outset of a case? The practical matter you have alluded to in the first

quote I read is that these cases have gone on for a long, long, long time. How do you balance all that? Just talk to us a little bit about

your philosophy. What is the appellate court role in this? I assume most of what you were talking about is at the district court

level because that is how these cases are initially dealt with and that is who has the jurisdiction, unless it goes up on appeal, but give me a little philosophy about the appellate court, and then I am going to turn to Mr. Straub to comment on that as well.

Mr. Straub, would you like to answer any of those questions that I posed-

Mr. STRAUB. I will try, Mr. Chairman.

Senator DEWINE. [continuing] Or take off on anything that Mr. Fletcher said?

Mr. STRAUB. It is true that the role of the courts of appeal in such cases is extremely limited, but they do, from time to time, have a necessary role.

As I recall, in the Federal courts in New York during the

Willoughby controversy, a district court held the Governor in contempt for, in effect, not having provided the necessary funding to

carry out certain programs. My recollection tells me that the Second Circuit reversed that. That is clearly the kind of role it should

be taking. I think that was a very sound decision.

It may well be then, in some instances, the courts of appeal might be further instructive in such matters to suggest to the district courts that they may be treading in the area of policy, legislative and executive implementation of that policy, by taking control of institutional matters and certainly by not staying their hand within a very short period of time.

Senator DEWINE. Maybe you could recount what you consider to be the significant life experiences that you have had that you will bring to the Federal district bench.

Mr. STRAUB. Mr. Chairman, you were good enough to let me flash a touch of pride at the outset in introducing my family, even those of my sons who are not here. I must tell you, quite candidly, that the most important life experience I have had is to have raised, with my wife, four sons, we hope successfully, but I believe that has brought us akin to the problems that everyday America has throughout the course of the Nation and throughout our lives, and I believe that would be of singular significance to me as a judge.

My experiences, as a practical matter, first in the legislature, I believe, Mr. Chairman, have taught me firsthand the significance of our tripartite government. I know from bitter personal experience what it is to draft a statute, have it enacted, and then have

it ignored by a judge. I shall take that very important lesson with me to the court, should I be fortunate enough to go there.

I have practiced law now for 35 years on all manner of issues, in courts of all stripe, in State and Federal jurisdictions. I believe I have come to know sufficient about the law, about its practice, about its effect on people, upon society, so as to be able to empathize with the problems that are brought before me, and, yet, by the same token, structurally confine myself to their resolution by the law in Constitution which governs our Nation.

Senator DEWINE. Thank you very much.

Senator FEINSTEIN. Talking about philosophy, let me ask each of you this question. How do you look at the law and the death penalty?

Mr. STRAUB. As Professor Fletcher indicates, that is settled law, and I would abide by it and so follow that decision.

Senator FEINSTEIN. Thank you very much.

Thank you, Mr. Chairman.

Senator DEWINE. Thank you.

I appreciate all of your patience. I appreciate your families' patience as well.

As you know, the record will remain open until the end of the week, which means that members of the committee may submit written questions to you. So, with that as a possibility, we would, of course, ask you to respond to those in a timely fashion.

We thank you very much for your testimony, and this will conclude today's hearing.

RICHARD TALLMAN
THURSDAY, MARCH 23, 2000
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 3:22 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond presiding.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. The committee will come to order. Today, we are conducting the eighth judicial nominations hearing of the 106th Congress. I welcome the distinguished members of the Senate who are present to introduce particular nominees and I welcome the nominees and their families.

Judicial nominations hearings are among the most important duties of this committee. A Federal judgeship is not only a position of great power, it is also one of great responsibility to the people of this Nation and to the Constitution.

I wish to proceed in the following manner. After opening statements, I would like for the members who are present to introduce

their nominees. They will constitute the first panel. The second panel will consist of these nominees: Richard Tallman, of Washington, to be U.S. Circuit Judge for the Ninth Circuit of Appeals;

Judge John Antoon, of Florida, to be U.S. District Judge for the Middle District of Florida; Marianne Battani, of Michigan, to be U.S. District Judge for the Eastern District of Michigan; and David Lawson, of Michigan, to be U.S. District Judge for the Eastern District of Michigan.

I would like to include in the record a statement from Senator Leahy.

Senator THURMOND. Senator Murray, do you want to introduce a nominee?

Senator MURRAY. Senator Gorton, the senior Senator, should go first. That would be appreciated.

Senator THURMOND. Do you want him to go first?

Senator MURRAY. Yes.

Senator THURMOND. That suits me. Go ahead.

STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator GORTON. Thank you. Mr. Chairman, it is with great pleasure that Senator Murray and I appear before you to recommend for the Ninth Circuit Court of Appeals, Mr. Richard

Tallman of Seattle. Senator Murray and I have developed a relationship that I think is as constructive or more constructive than

any in the U.S. Senate in putting together a bipartisan committee to make selections to submit to us for a final choice. The result has been, in my opinion, a series of highly qualified men and women of fine legal standing, generally speaking, non-controversial in nature, for these positions.

In addition to the personal relationship that Senator Murray and I have created, we have a highly constructive arrangement between the two of us on the one hand and the White House and its appointments on the other, and it is through that system that we bring Mr. Tallman before you here today.

His name was submitted to the two of us, ironically, in an earlier competition for a District Court judgeship and another person was picked. The opportunity, however, that arose for the Ninth Circuit Court of Appeals, to choose the other of two very highly qualified candidates, was a joy and a delight to me and I am sure to Senator Murray, as well.

I do not believe that he was an individual who was known personally to either of us before this procedure began, but he is a tribute to the quality of that process. He has broad bipartisan support in the State of Washington and its legal community, from the Attorney General of the State, my successor, who is a Democrat, two former U.S. Attorneys for Western Washington, the Federal public defender from Western Washington, the President of the Ninth Circuit District Judges Association, and the Federal Bar Association in the Western District of Washington.

For an extended period of time, he was a partner in one of Seattle's largest law firms, Bogle and Gates, but recently, he has been

a principal in a small firm that specializes in white collar criminal defense. He has been an Assistant U.S. Attorney for the Western District of Washington and has been a special assistant city attorney, deputy prosecuting attorney, and Special Assistant Attorney

General from the State of Washington. He has taught and lectured extensively to groups of lawyers and non-lawyers on a wide range of legal topics.

His civic career has been equally noteworthy, he has participated in many bar associations and has himself worked on the selection of judges for State court positions. He is an Executive Board member of the Chief Seattle Council of the Boy Scouts of America, and

I guess I note he is the third recent judicial nominee from our State who has participated extensively with either the Boy Scouts or with the Girl Scouts, though I do not think that either Senator Murray or I require this as an absolute prerequisite for selection.

I could not recommend a candidate to you more unreservedly. He will be a fine addition to the Federal bench and I hope that the Judiciary Committee will be able to act both promptly and favorably on his nomination.

Senator THURMOND. Senator Murray.

STATEMENT OF HON. PATTY MURRAY, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator MURRAY. Thank you very much, Mr. Chairman. It really is my pleasure to be here with Senator Gorton today to introduce Dick Tallman, who is a distinguished lawyer and a former U.S. attorney to this committee, and I am pleased to recommend him and

urge the Senate confirm him as a Circuit Judge for the Ninth Circuit. I also want to take a moment to recognize his wife, Cynthia,

who is here with him today and is an outstanding member of the community, as well.

Mr. Chairman, it is a delight to again be here with Senator Gorton as we have worked through the process of making sure that we

fill our judicial nominees in a manner that is best for our State and our country and I thank him for his continued work with me to put forward, I think, some of the best nominees that this Senate has confirmed over the last several years. So I appreciate his work and we are delighted to be here together today to present Dick Tallman to you.

Both Senator Gorton and I assisted the President in choosing him and he possesses strong support from a diverse group of attorneys and community leaders at home in Washington State.

As Senator Gorton said, Dick Tallman began his legal career as a law clerk for U.S. District Judge Morell Sharp in Seattle. He then moved on to work successfully as an attorney for the Justice Department, and in 1980, he rose to become Assistant U.S. Attorney for the Western District of Washington. After 3 years as Assistant U.S. Attorney, he went on to an admirable career in private practice, specializing in complex commercial litigation. He also spends his spare time supporting a number of civic activities and teaching law, as Senator Gorton mentioned.

Outside of his many professional credentials that have been presented to you, I have had the opportunity to meet and talk with

him many times and I just want to share with my colleagues how impressed I have been with his professionalism and his decency.

It is my pleasure to introduce to this committee a great lawyer who I believe will make an exceptional Federal judge and I urge this committee to approve his nomination and I hope we have a confirmation on the floor of the Senate as soon as possible. Thank you very much, Mr. Chairman.

Senator THURMOND. Thank you very much.

I ask that each nominee stand at the witness table and raise your right hand and I will administer the oath. Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth,

so help you, God?

Mr. TALLMAN. I do.

Senator THURMOND. Thank you. If any of you have any opening statements or would like to introduce any family or friends who are with you today, please feel free to do so at this time.

TESTIMONY OF RICHARD TALLMAN, OF WASHINGTON, TO BE
U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Mr. TALLMAN. Thank you, Mr. Chairman. I would like to introduce my wife, Cynthia Tallman, if she would stand. I would also

like to introduce Robin Taub, who practiced law with me in Seattle, and two of my former partners from the firm of Saltzman and Stevens who practiced with me at Bogle and Gates, Gary Stevens and Ruth Tiger.

Senator THURMOND. Thank you very much.

Mr. TALLMAN. Mr. Chairman, I regret that my mother, Jean Tallman, could not be with us today, but I know she is here in spirit. Thank you.

Senator THURMOND. Mr. Tallman, in our tripartite system of government, the Congress under the Constitution makes the law. The

President as the chief executive enforces the law. The judiciary interprets the law. Some judges seem to think they have the authority to make law. What is your opinion of my interpretation of our Federal system of government?

Mr. TALLMAN. Mr. Chairman, I agree with your characterization of the separation of powers. I believe that judges should abide by their constitutional obligation to interpret, not make law.

Senator THURMOND. I am glad you agree with me.

Mr. TALLMAN. Yes, sir.

Senator THURMOND. Mr. Tallman, there has been much controversy about judges overturning the will of the people through

voter initiatives in California, such as Proposition 209. Should judges show deference to the voters when reviewing the constitutionality of voter initiatives?

Mr. TALLMAN. Mr. Chairman, I believe that the courts have an obligation to give the same deference to voter initiatives as we are obligated to do to statutes enacted by Congress, and that is that they are presumed to be valid unless shown to be against the Constitution.

Senator THURMOND. Now I have questions for all the nominees. I will ask the question and then start with you and go down the line. Do any of you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence?

Mr. TALLMAN. Senator, I do not.

Senator THURMOND. The next question, what is your view on mandatory minimum criminal sentences and would you have any reluctance to impose them as a judge?

Mr. TALLMAN. Senator, the Congress made it clear that it was seeking to achieve consistency in sentencing. The Supreme Court has upheld the sentencing guidelines and I will follow them.

Senator THURMOND. As you know, the sentencing of criminal defendants in Federal court is conducted under the Federal sentencing guidelines. Some argue that the guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal sentencing guidelines and their application?

Mr. TALLMAN. Senator, as I have previously stated, the Supreme Court has determined they are constitutional and I would be obligated to abide by them.

Senator THURMOND. It is my view that judges should have judicial temperament. The more power an individual has, the more

courteous he or she should be. Probably no one in our society has more power over the lives of individuals than a Federal judge, so it is especially important that someone in this role be courteous and civil. Do you agree?

Mr. TALLMAN. Absolutely, Senator.

Senator THURMOND. Now this question. What do you believe was the most significant Supreme Court decision in the past 30 years and why?

Mr. TALLMAN. Mr. Chairman, I would have to say that in the field that I practice in, primarily criminal law, it would have to be either *Miranda v. Arizona* or *Gideon v. Wainwright*, which *Gideon*, of course, gave the accused the right to appointed counsel in serious criminal cases to ensure that their sixth amendment rights were respected.

Senator THURMOND. Many complain that a case takes too long to wind its way through the courts. As a Federal judge, what specific measures do you intend to implement to encourage the speediest resolution of your cases?

Mr. TALLMAN. Senator, I will work hard. I will try to employ alternative dispute resolution mechanisms. The Ninth Circuit actually has a trial project involving a settlement commissioner and we have been able to settle about ten percent of our cases on appeal that way.

Senator THURMOND. I would like to thank all the nominees for being here today. I ask that any follow-up questions be submitted to the committee by close of business on Monday. Thank you.

Mr. TALLMAN. Thank you, Mr. Chairman.

Senator THURMOND. The committee is adjourned.

WILLIAM TRAXLER
WEDNESDAY, SEPTEMBER 9, 1998
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond, presiding.

Also present: Senators Sessions, Feinstein, and Durbin.

OPENING STATEMENT OF HON. STROM THURMOND A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND, The committee will come to order. I wish to welcome all of you to this hearing of the Senate Judiciary Committee. We are here to consider judicial nominees for the circuit court

of appeals and the district court. It is a pleasure to have distinguished members of the Senate present to introduce particular nominees, and I am pleased that the nominees were able to be here today.

Hearings on judicial nominees are one of the most important responsibilities of this committee. A Federal judgeship is not only a

position of great power and status, it is also one of greatest responsibility to the people of this Nation and to the Constitution.

I wish to proceed in the following manner: After I call on the ranking member for any opening statement, I would like for the members who are present to speak in support of particular nominees. Senators will constitute the first panel. Then we will consider

the judicial nominees in the second and third panels. In the second panel will be the two circuit nominees, Judge William Traxler of South Carolina and Robert King of West Virginia, for the Fourth Circuit Court of Appeals. The third panel will consist of the district court nominees.

Before we start questioning the judges, I will call on them to make any opening statement that they wish to make and introduce any friends or family who are attending with them today.

I don't believe we have a ranking member here. If he comes in, just send him on up.

It gives me great pleasure to introduce to the committee Judge William B. Traxler, Jr., who is the President's nominee to be a judge on the Fourth Circuit Court of Appeals. Judge Traxler is highly qualified and prepared to serve on the fourth circuit. He is an outstanding choice for this most honorable position of public trust.

After graduating from the University of South Carolina School of Law, where he served on the Law Review, Judge Traxler started his legal career in private practice with his father in 1973. He then went to work in the State district attorney's office, which our State calls the solicitor's office. He rose to become solicitor for the 13th circuit. In that capacity, he developed a reputation as a tough but fair prosecutor.

Later he was elected by the South Carolina General Assembly to be a resident circuit court judge for our State in 1985. He soon became known as one of the best trial court judges in South Carolina.

President Bush nominated him for the district court in 1992 upon

my recommendation, and he has served with distinction there for the past 6 years. During that time, he has been active in helping promote the development of the law and the legal system. He has lectured and written for numerous continuing legal education seminars for the South Carolina bar and other legal organizations. Last year, he was elected to the board of directors for the Federal Judges Association.

As a trial judge in the State and Federal courts, Judge Traxler has developed a reputation for being fair, courteous, intelligent, well-prepared, and hard-working. He is also a man of great character and integrity. He is married and has two children.

I have spoken to and heard from numerous people in my State who wholeheartedly endorse this nomination. I am confident he will bring the fine traits that have made him such a popular trial judge with him to the appellate court. I am extremely pleased that he is before us today, and I look forward to his quick confirmation.

I will now turn to my distinguished colleague from South Carolina, Senator Hollings.

STATEMENT OF HON. ERNEST F. HOLLINGS, A U.S. SENATOR
FROM THE STATE OF SOUTH CAROLINA

Senator HOLLINGS. Thank you, Mr. Chairman.

As you have indicated, Judge Traxler is tried and true. You would think after having been one of the most successful prosecutors, having as a solicitor gotten more convictions, that there would have been disputes when you recommended him for the U.S. district judgeship. But, on the contrary, on both sides of the aisle defendants or prosecuting attorneys, judges or practitioners, plaintiff's or defendant's counsel, he has been a unanimous choice. I

have never made a more popular choice than your choice as the Federal district judge now to be elevated to the full circuit court of appeals. I think about the only thing you left out going down ad seriatim was that the Federal judges themselves now have selected Judge Traxler on the board of directors of the Federal Judges Association to represent them.

I think nothing more needs to be said. I would ask consent that my prepared statement be included in the record at this particular point.

Senator THURMOND. Without objection, so ordered.

Senator HOLLINGS. Thank you, Mr. Chairman.

Senator THURMOND. I will now administer the oath to Mr. King and Judge Traxler.

Please raise your right hand. Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge TRAXLER. I do.

Senator THURMOND. Judge Traxler.

TESTIMONY OF WILLIAM B. TRAXLER, JR., OF SOUTH CAROLINA, TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT

Judge TRAXLER. Mr. Chairman, I also appreciate the opportunity to be here, to have this hearing, and I appreciate the support I have received from a lot of people. I am here by myself, and I am ready to proceed.

Senator THURMOND. All of your family who are here and friends here of Judge Traxler, please raise your hand. Thank you very much.

Senator THURMOND. Judge Traxler, if you are confirmed, what do you see as the greatest difficulty you will have in transferring from the district court to the court of appeals?

Judge TRAXLER. Senator, as a district court judge, I enjoy the rough and tumble of trial court, and I enjoy the daily contact that we have with litigants, with lawyers, prisoners that I work with. And I think that going from a trial court with active involvement with people every day to a circuit court, hopefully, where there will be more reading and writing, is going to be a difficult transition for me, but one I believe that I can make the adjustment for.

Senator THURMOND. Mr. King and Judge Traxler, what role do you believe judges have in developing public policy through case law when the legislature repeatedly fails to address important matters?

Judge TRAXLER. In my opinion, Mr. Chairman, the courts have no role.

Senator THURMOND. Do either of you have any personal objections to the death penalty that would cause you to be reluctant to impose or oppose a death sentence?

Judge TRAXLER. I have no opposition to the death penalty, Senator. Have sought it as a prosecutor. I have imposed it as a judge.

Senator THURMOND. Do either of you have any objections to mandatory minimum criminal sentences that would cause you to be reluctant to impose or oppose such a sentence?

Judge TRAXLER. Mr. Chairman, I recognize the right of Congress to establish mandatory minimums, and I recognize the laudable purposes that they serve, and I impose them and uphold them without hesitation.

Senator THURMOND. As both of you know, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the guidelines do not

provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

Judge TRAXLER. Senator, I am a strong supporter of the sentencing guidelines. I likewise came from a system where there were no

sentencing guidelines. There were no limits on a judge's discretion in imposing sentences. And too many times I believe sentences were imposed that depended on what judge you got, what county you happened to be arrested in or brought to court in, perhaps even what day of the week you were sentenced. And I was glad to come to a system in the Federal system where they had sentencing guidelines so that I could ensure that not only my sentences but those of my fellow judges would treat similar defendants committing similar crimes in a similar fashion.

Senator THURMOND. Senator Sessions, do you have any questions?

Senator SESSIONS. Senator Durbin may be prepared next, and I am-

Senator DURBIN. Thank you very much.

Senator THURMOND. I will call on you in just a minute.

I called on you now.

QUESTIONING By SENATOR SESSIONS

Senator SESSIONS. All right. Very good.

Mr. King, you and Judge Traxler will be taking on a tough job in the fourth circuit. I believe, from the testimony we had with

Judge Harvey Wilkerson, Senator Thurmond, that the fourth is the busiest circuit; if not the busiest the second busiest circuit in America. And they take great pride in the quality and volume of work

they turn out: I would ask you for your commitments. Do you recognize that this is more than a retirement job, it is a very tough

job, and are you prepared to give it your best professional effort?

Judge TRAXLER. Senator, I look forward to the challenge. I enjoy

hard work. I work a full five days every week. I take work home with me at night and the weekend. I am looking forward to it.

Senator SESSIONS. Well, you were a State prosecutor, Mr. Traxler, and then you became a Federal judge in a sentencing guidelines system, and you made some comments to Senator Thurmond that you like that change. Would you share a little more insight on your feeling about that?

Judge TRAXLER. Yes, sir. I think that, first of all, I want my sentences to be consistent. For the sentences I give defendants, I

would think that my sentences and the sentences of every judge should be roughly consistent with those of other judges, so that when a criminal defendant is sentenced, it doesn't depend-you know, what his sentence is doesn't depend on what judge he happened to get or what judge happened to be holding court. And I

think that the sentencing guidelines afford me that opportunity and permit a situation where similarly situated defendants that commit similar crimes are treated similarly, regardless of where they are sentenced and by whom they are sentenced.

Senator SESSIONS. Well, I think you are right, and Senator Thurmond, as you well know, was the champion of the sentencing guidelines and honesty in sentencing, and Judge Wilkins, I believe, from South Carolina was the first sentencing commissioner and head of that commission; I think it has done a good job, too. I was there.

I saw the change in Federal court, and it is not healthy when two defendants come before two different judges and one gets 15 years and one gets probation. Something is not fair there, and I know some people disagree with the guidelines.

Senator SESSIONS. Well, I think the Supreme Court case in BMW involving the State of Alabama indicates that there is a due process argument, there has to be some articulatable basis between the

verdict obtained and the actual wrong to the victim. And I think that is going to call on judges to be scrutinized in ways that maybe haven't done so before.

Do you have any comments about that, Judge Traxler?

Judge TRAXLER. Senator, I view a verdict from a jury as an expression of the will of the people, and I am extremely reluctant to

interfere with a jury's verdict. But there have been occasions where I have felt under the law that the verdict was excessive and have reduced verdicts. It has probably been two or three times in 13 years.

Senator SESSIONS. Well, I agree that the verdict is an expression of that jury, but also some standards need to be applied, some connection, and the Supreme Court, as a matter of due process, has

held that there needs to be a connection between the amount of damages sustained and the amount of damages awarded, unless you get into a criminal case, in which there is no limit on any penalty that can be imposed.

Well, I thank you very much for being here. You are undertaking a very important position, the court of appeals, one step from the U.S. Supreme Court. You will be setting law for a number of States and will be involved with a large number of very important cases.

We hope that you will be successful in this process, and you have received good support from your Senators, and we appreciate that.

Thank you, Senator Thurmond.

Senator THURMOND. Thank you.

Senator Durbin.

QUESTIONING BY SENATOR DURBIN

Senator DURBIN. Thank you, Mr. Chairman.

Judge Traxler, you are moving up, if this is a successful effort, from the district court to the circuit court. And could you tell me why you would seek that change of venue?

Judge TRAXLER. Well, the job I have now and the job I seek combine two interests, two great interests in my life. One is the law, which I thoroughly enjoy and love, and public service, which I thoroughly enjoy and love. And this, moving into this other position, if you permit me to do so, would just allow me to continue that work and those pursuits in a greater capacity.

Senator DURBIN. I would like to ask a follow-up question to Senators Thurmond and Sessions on sentencing guidelines. As a prosecutor and as a former--or as a Judge and prosecutor, I would like to ask you, have you had cases where you felt the sentencing guidelines were unfair in light of the circumstances, where, in fact, if you had looked at the individual defendant you would say the range of sentencing guidelines given to us by the Federal Government, the Congress in this case, really don't take into consideration some factors which they should, and perhaps are too harsh in terms of the options offered to the prosecutor and to the judge? Have either of you run into those circumstances?

Judge TRAXLER. I can't recall any situations that I have had in sentencing criminal defendants where I felt like the sentence I was giving was way out of line with what I might otherwise have imposed without the guidelines.

Senator DURBIN. Thank you for your testimony. Thanks for being here today.

Thank you, Mr. Chairman.

Senator SESSIONS. I would like to ask one more question.

Senator THURMOND. Senator Sessions.

Senator SESSIONS. Judge Traxler, as regards habeas reform, prisoner and litigation reform, have you been able in your experience to notice any change, and how would you evaluate the results of habeas reform?

Judge TRAXLER. One of my most beneficial provisions that I am looking forward to obtaining the benefit from is the statute of limitations on the filing of habeas petitions, because it is extremely difficult for everyone when petitions are filed where the last State action was years and years and years ago, and you have to go back and try to reconstruct the record. So all of my experiences with it have been positive.

Senator SESSIONS. Thank you very much.

Senator THURMOND. Well, that completes the hearing on you, gentlemen. I wish you well, and I feel certain that the Senate will confirm you. And you are now dismissed.

Judge TRAXLER. Thank you.

KIM WARDLAW
THURSDAY, JUNE 18, 1998
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Jon Kyl, presiding.

Also present: Senators DeWine, Kohl, and Feinstein.

OPENING STATEMENT OF HON. JON KYL, A U.S. SENATOR
FROM THE STATE OF ARIZONA

Senator KYL. The hearing will come to order. Welcome to this hearing of the Senate Judiciary Committee for the purpose of considering nominees to both the district and circuit courts of the United States.

The individuals who will be subject to consideration today are: for the circuit court, this for the eighth circuit court, John D. Kelly, of North Dakota; for the ninth circuit court, Kim McLane Wardlaw, of California; and for the district courts, first of all, from Arizona, Judge Raner Collins; from Louisiana, Robert James; for the Northern District of Ohio, Dan Polster; and for the Middle District of Louisiana, Ralph Tyson.

We will have a member of the minority, probably Senator Kohl, joining us briefly. I know that Senator DeWine is on the panel, so I will recognize Senator DeWine first.

Now, let me first set the procedure here. Given that Members of Congress are here, we will ask them to introduce nominees that they would like to introduce to the committee, and then, of course, the members are free to leave, although I suspect at least Senator DeWine, a member of the committee, might want to stay. Then after that is completed, we will have the circuit court nominees come forward, and they will be questioned and given an opportunity to introduce their families and friends who are here, and

then following that, the nominees for the district court.

What I thought I would do next, since it is customary for the committee to consider the circuit court nominees first as a panel and then the district court nominees, since we have two circuit court nominees and we have the four Senators representing the States of those two nominees, to hold their introductions for right now. And perhaps the way we could do it is this: I will call upon Senator Feinstein and Senator Boxer first to introduce their nominee, and then call upon Senator Conrad and Senator Dorgan to introduce their nominee. When you are called upon, please introduce the members of your family who are here or friends that you would like to introduce, and then come forward to the dais.

Let me begin with another member of the Senate Judiciary Committee, my colleague, Senator Dianne Feinstein, and I must say, by

the way, when I saw Dianne Feinstein's nominee on here, I didn't ask any other questions about the quality of the candidate. I knew that that was good enough for me, and that really is the way that Senator Feinstein and I generally do business together.

So, Senator Feinstein, welcome to your committee, and the floor is yours.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Senator KYL. Senator Feinstein, could I ask you to hold for just

one moment?

Senator FEINSTEIN. Of course.

With that, Senator Feinstein, again, my apologies. The floor is yours.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR
FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thanks very much, Mr. Chairman.

I am very pleased to be here with my friend and colleague, Senator Boxer, to support the nomination of Judge Kim Wardlaw to

the Ninth District Court of Appeals. Actually, we were both here in 1995 when I had the honor of recommending Kim Wardlaw, then not a judge, to the district court, and the President nominated her. Not only that, but she had one of the fastest confirmations that I know of before this body. She won the unanimous support of the Judiciary Committee and the entire Senate, and I hope that will be the case again.

Her record of service, both in the private and public community, is highly respected. She has spent 2 1/2 years now on the Federal district court. For those of you who are not familiar with her background, she graduated summa cum laude from the University of

California at Los Angeles. She was Phi Beta Kappa. She received the departmental highest honors.

She continued at UCLA Law School, where she graduated fifth in a class of 300. She served as an extern for Judge Joseph Sneed of the U.S. Court of Appeals for the Ninth Circuit. She was articles editor for the Law Review. In fact, she has been named Outstanding Graduate in the Class of 1979 by the UCLA Law School alumni.

From 1987 until the time she joined the U.S. district court in 1995, she served as a partner in the litigation department of the Los Angeles law firm of O'Melveny & Myers, where she has handled all phases of complex civil litigation, in both State and Federal courts.

For her work in that capacity, she has also won numerous honors. California Law Business named her as one of California's top

25 lawyers under the age of 45. I won't ask if she is still under the age of 45. The Los Angeles Business Journal named her one of the 100 most prominent business attorneys in Los Angeles County.

And the Women Lawyers Association of Los Angeles awarded her the 1995 Member of the Year Award, partly in tribute for her tireless efforts as president of that association.

She has also served as a trustee of the Los Angeles County Bar Association, an active member of the State bar, and treasurer of the Association of Business Trial Lawyers.

Since joining the Central District Court on December 26, 1995, she has earned the respect of her colleagues on the bench and the Los Angeles legal community at large. She has strong, bipartisan support. I think she is going to make an outstanding member of the ninth circuit, which many have criticized, and with some justification.

Among her supporters, we have letters from Judge Dickran Tevrizian of the Central District of California, Los Angeles Mayor Richard Riordan, Dean Prager of the School of Law at UCLA, Dean Cowan of the Annenberg School for Communication at USC, His Eminence Cardinal Roger Mahony, the Archbishop of Los Angeles, as well as a host of others, and if I might ask unanimous consent that letters be entered into the record as well.

Senator KYL. Without objection.

Senator FEINSTEIN. So I am just very pleased to be here again on behalf of Judge Wardlaw, and I hope this distinguished committee would view her with the same alacrity you did in 1995.

Thank you very much.

Senator KYL. Thank you, Senator Feinstein.

Senator Boxer.

STATEMENT OF HON. BARBARA BOXER, A U.S. SENATOR FROM
THE STATE OF CALIFORNIA

Senator BOXER. Thank you very much and, Senator Feinstein, I am delighted to be here with you. This is wonderful.

This committee said yes to this nominee once before, and we hope very much that you will say yes again. Your judgment was good, and it has been validated.

I wanted to say that Judge Wardlaw today is here with her husband, Bill, who is a very prominent person in his own right. We

are very happy to see him here.

Rather than repeat, I will be very brief, Mr. Chairman, in the interest of time and because I thought Senator Feinstein went over

it and hit all the high points. So I would ask unanimous consent that my statement be placed in the record.

Senator KYL. It will be placed in the record.

Senator BOXER. Mr. Chairman, let me simply quote just a few people to tell you what they think about this fine judge.

Richard Burge, the president of the Association of Business Trial Lawyers, had this to say about Judge Wardlaw:

“Her expertise with business cases can make a real contribution to the ninth circuit, and business trial lawyers and their clients will welcome her confirmation by

the Senate. Because the court of appeals is effectively the court of last resort, the intellectual ability to understand the legal precedent and the courage to apply it are critical attributes for a court of appeals Judge. Judge Wardlaw has both.”

And in a letter to Chairman Hatch, former ninth circuit Judge William Norris praised Judge Wardlaw's abilities and supports her nomination.

As was stated Mayor Richard Riordan, who has known the judge for 15 years and who appreciated her service as his senior advisor, expresses his unwavering support.

Bernard Parks, the chief of police for Los Angeles, also supports Kim and says, "I have always been impressed with Judge Wardlaw's deliberative interpretation of the legal matters with which she is presented."

Republican district court judge for the central district of California, Judge Waters, says, "I believe that Judge Wardlaw would be

a splendid addition to the Ninth Circuit Court of Appeals, and I would have complete confidence in her integrity, knowledge of the law, and intellectual ability."

J.W. Marriott, Jr., chairman of the board and CEO of Marriott International, was kind enough to convey the support of Joseph Ryan Marriott's executive vice president and general counsel, for her elevation to the ninth circuit.

It goes on and on. I wanted, Mr. Chairman, just to speak of a few, because I think they show her strong, bipartisan support. And with that, I wish you very well, Judge Wardlaw, and I hope the committee will respond to you as they did the first time.

Senator KYL. Thank you very much, Senator Boxer. I would note the committee received many, many other recommendations as well, and I am well aware of them.

Now, if I could ask John D. Kelly, of North Dakota, and Kim McLane Wardlaw, of California, to come forward, please. Before you are seated, could I ask you to take the oath with me?

Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge WARDLAW. I do.

Senator KYL. Thank you very much.

Well, you have been well introduced, as you have heard, but I would afford you at this time the opportunity to make any opening remarks that both of you would like to make.

Ms. Wardlaw, Would you like to begin?

TESTIMONY OF KIM MCLANE WARDLAW, OF CALIFORNIA, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Judge WARDLAW. I have no opening remarks. However, I would like to introduce two more people who traveled with me from California: my judicial assistant Judy Flowers, and my law clerk, Amy

Nemko. If they would stand?

Senator KYL. Would you both please stand? Welcome. It is a pleasure to have you here, too.

Judge WARDLAW. Also, I would just like to mention for the record that my two children, Katie Ann, who is 3, and Billy, who is 8, couldn't be here. They are in Hawaii with their grandmother, my mother, who also wishes she could be here. But I think they are all having a good time there.

Senator KYL. I am sure they are.

Judge WARDLAW. I just wanted to mention them for the record, so they won't look back and be upset about this.

Senator KYL. That is right. I wish-well, I guess this may be carried, so maybe they are able to watch it right now.

Well, thanks very much. We had a little meeting this morning of the Judiciary Committee. I indicated that we would be holding this hearing this afternoon. We had a little discussion about filling judicial vacancies, and I made the comment that we had a great panel this afternoon that we should be able to move quickly through the committee if all goes well. And I hope that with that announcement that all of you who might be perhaps a little bit concerned about the committee's intentions can rest at ease.

Obviously, people may have questions, and we may want to go into matters, but the fact of the matter is this is a terrific panel, in both the district and circuit court nominees.

I would like the people in the audience to know at the outset that from now on it may appear to be a bit perfunctory because the questions that we will ask are not long and involved and get into a lot of history of the background of the nominees. There is a little bit about judicial philosophy, adherence to precedent, things of that sort that we want to ensure is on the record. But you should not take from the fact that all of the committee is not present or that we don't take 6 or 8 hours in this hearing as an indication that there is a lack of interest or a lack of concern in obtaining the quick confirmation of these nominees. Rather, the fact that the

hearing is done relatively quickly, without a great deal of time or involvement, should be a suggestion that these nominees have performed so well in their background and that enough people have

already looked at their background to assure many of us that the confirmation process should go fairly quickly and fairly well.

So we hope that that is the case, and, again, I don't want you to take from the speed with which we do this any suggestion that the members of the committee do not care to go into more detail.

Now, with that, let me ask a couple of questions of our two nominees, and then I will turn first to Senator Kohl and then to Senator

DeWine for questions that they may have. And I will rotate.

Are you committed to following Supreme Court precedent and the rulings of the Federal Circuit Court of Appeals or our circuit faithfully and giving them full force and effect even if you might personally disagree with the precedent or the rulings?

Judge WARDLAW. Absolutely.

Senator KYL. And, Ms. Wardlaw, what would you do if you believed that the Supreme Court or perhaps previously your circuit

had seriously erred in rendering a decision? Would you nevertheless apply that decision? Or would you apply your own best judgment of the merits? Take, for example, the Supreme Court's recent decision in the City of Boerne v. Flores case where the Court struck down the Religious Freedom Restoration Act. A pretty difficult question, I might add.

Judge WARDLAW. Well, Mr. Chairman, I certainly would follow

the law even if I disagreed with it. In fact, sitting on the ninth circuit by designation, I recently wrote an opinion in which the panel

disagreed with the existing ninth circuit law. We nevertheless followed it, invited en banc review. It was reviewed, and it was overruled by the ninth circuit itself in the appropriate way.

Senator KYL. Thank you.

Under what circumstances do you believe it appropriate to declare a law of Congress unconstitutional?

Ms. Wardlaw.

Judge WARDLAW. Such a circumstance would be extremely rare.

There is the presumption of constitutionality, and the court is obligated to construe it as constitutional if at all possible.

But if clearly

established precedent indicated otherwise, then I would be obligated to follow that.

Senator KYL. Thank you. I may have some more questions later.

Senator Kohl.

QUESTIONING BY SENATOR KOHL

Senator KOHL. Thank you very much, Senator Kyl.

Mr. Kelly and Ms. Wardlaw, in the past few years, there has

been a growth in the use of so-called protective orders in product

liability cases. Critics of this trend believe that these orders sometimes prevent the public from learning about health and safety

hazards. The issue has been debated repeatedly by the Judicial

Conference.

Let me ask you this question. Should a judge balance the public's

right to know against the litigant's right to privacy when the information sought to be sealed could keep secret a public hazard?

Judge WARDLAW. Senator Kohl, I think that is a very serious

question. I think the balancing analysis that you laid out is the appropriate analysis. One must weigh the needs of the litigants to obtain a speedy resolution and fair resolution of their case and avoid

costly litigation against the public interest and possible harm to

persons that might occur by sealing that information.

I would just also note that the Supreme Court wrestled with that

sort of a secrecy order last term in the Baker case.

Senator KOHL. All right. Folks, could you cite two Supreme Court cases in this century that you believe to be the most significant?

Judge WARDLAW. Well, I take it by your question, Senator, and by Mr. Kelly's answer that it can be significant for either the better or the worse.

Senator KOHL. Whatever.

Judge WARDLAW. Whatever. All right. I would say that Brown v.

Board of Education is the most significant case of this century because it made racial segregation of school children unthinkable.

And I would agree that as far as the worst case of this century, I would say Dred Scott and the Korematsu cases because they took away rights of U.S. citizens.

Senator KOHL. All right. Let me ask you this hypothetical question: Say you were called upon to review a case involving a school

voucher program which allowed a city to spend taxpayer money to send students to parochial or other religious schools. Without saying which way you might decide the case, please describe the methodology you would apply and the factors you would consider most important in reaching your decision.

Judge WARDLAW. I believe that fact question calls for an analysis under the establishment clause, and the Supreme Court has recently reaffirmed in the Agostini case that the three factors from

Limon v. Kurtzman would apply. So one would have to apply the law of the Supreme Court, and three factors are whether or not there is a secular purpose, whether or not religion is advanced, and whether or not there is excessive entanglement with religion by the State to the particular factual circumstances that are before it.

Senator KOHL. Thank you.

Thank you, Mr. Chairman.

Senator KYL. Senator DeWine.

QUESTIONING BY SENATOR DEWINE

Senator DEWINE. Thank you, Mr. Chairman.

Judge Wardlaw, I noticed in your resume here or the papers that we have had a chance to look at that you received the BUDDY Award. What is that?

Judge WARDLAW. The BUDDY Award is given by the NOW Legal Defense Fund to a woman and her family to reward success by an entire family-BUDDY stands for Bringing Up Daughters Differently, so success by a family in bringing up a daughter to participate in a profession that maybe is not 100 percent accessible to all women.

Senator DEWINE. Thank you very much.

Judge Wardlaw, could you explain or describe what you think were the significant cases in which the Women's Lawyers Association of Los Angeles filed amicus briefs during the time that you

were the president from 1993 to 1994 and, also, what role you played during that time in the selection of the cases?

Judge WARDLAW. During that year, I can only recall one case in which there was an amicus brief filed. I, of course, was the president. There was a separate amicus brief committee that would take

in requests for writing briefs. They would then bring them to the board, and the board would vote on them.

The one case that I recall where the organization wrote an amicus brief was a case where a judge had excluded a housewife from

sitting on a jury, saying that her life experiences were not sufficient to give her an understanding of ruling in a

criminal case.

Senator DEWINE. That was a pretty easy one.

Judge WARDLAW. Yes.

[Laughter.]

We were for homemakers.

Senator DEWINE. You would remember that one, I think.

Judge WARDLAW. I remember that one.

Senator DEWINE. Any others that you can recall?

Judge WARDLAW. I really don't recall any others.

Senator DEWINE. And tell me again--you had this committee.

Did you sit on the committee?

Judge WARDLAW. No, I did not.

Senator DEWINE. Did the president sit on the committee?

Judge WARDLAW. No.

Senator DEWINE. As a member of the American Bar Association, do you believe it is appropriate for the ABA to take positions on issues such as abortion?

Judge WARDLAW. Well, I am an inactive member of the ABA. I belonged to it for mostly educational reasons and for reasons--before I became a judge, professional advancement. But I actually

would prefer that the ABA did not take positions on other than issues that are central to the legal profession.

Senator DEWINE. Thank you, Mr. Chairman. Thank you, Judge.

Senator KYL. Thank you. If I may ask both of you just one other question, do either of you have any legal or moral beliefs which would inhibit you or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a Federal judge?

Judge WARDLAW. No, and I have issued rulings in a capital habeas corpus case that had the effect of upholding the death penalty.

Senator KYL. All right. Let me ask you just one more question.

The general subject here is affirmative action or preferences.

Would you state in detail your best independent legal

judgment, irrespective of existing judicial precedent, on the lawfulness under the equal protection clause of the 14th amendment and

the Federal civil rights laws of the use of race-, gender-, or national

origin-based preferences in such areas as employment decisions--hiring, firing, promotions and so on--college admissions and scholarship awards, and the awarding of governmental contracts? What

is your understanding of the lawfulness under the equal protection clause of the use of race and gender and national origin for those purposes?

Judge WARDLAW. The Supreme Court has held that racial classifications are unconstitutional unless they are narrowly tailored to

meet a compelling governmental interest. That is the strict scrutiny standard, and that is the highest standard that the Court

would apply to such cases.

Senator KYL. And that is the test you would presumably apply?

Judge WARDLAW. That is the test I would apply.

Senator KYL. All right. Thank you.

Well, let me thank both of you for being here, for your cooperation. If there is anything further that you wish to submit to the

committee, I don't think we have a time limit for doing that. Please feel free to do that, and, of course, the committee will correspond with you with respect to further proceeding on your nominations.

Thank you very much, and congratulations.

Judge WARDLAW. Thank you, Mr. Chairman. May I just say thank you on the record to both Senators Feinstein and Boxer as well for having been here?

Senator KYL. Absolutely.

Judge WARDLAW. All right. Thank you very much.

Senator KYL. Thank you.

JAMES WARE
WEDNESDAY, OCTOBER 29, 1997
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:02 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Jon Kyl presiding. Also present: Senators Specter, DeWine, Sessions, Kohl, Feinstein, Feingold, and Durbin.

OPENING STATEMENT OF HON. JON KYL, A U.S. SENATOR
FROM THE STATE OF ARIZONA

Senator KYL. Good afternoon. This Senate Committee on the Judiciary judicial nominations hearing will now begin.

In order to expedite the process-we have a lot of candidates today-we will follow a procedure which will divide our witnesses into three panels. The first panel will be Members of the Senate and House who will introduce candidates. Sometimes in the past, we have had the candidates come forward at the same time. We will not do that this afternoon. We will hear the Members of the House and Senate first.

Then the second panel will be the bulk of the candidates who will come forward and be seated at the table and I will administer the oath at that time to all of the candidates and then proceed to ask questions seriatim. In that second panel, we will begin with a nominee for circuit court. The third panel will do the same with nominees for the district court, and the fourth panel will consider a district court nominee who was carried over from a hearing yesterday.

We will necessarily, because of the presence of certain Senators and absence, take these nominees not necessarily in any particular order but as the Members of the House and Senate appear.

I might also indicate to the people who are in the audience that we might be able to use a little judicial help here on the Senate floor. We are in a bit of a procedural snafu at the moment and I do not expect that we will have any votes, but there will be Senators missing as a result of what is occurring and there are also

some Senators who are occupied elsewhere.

Finally, in order to conclude our hearing today in an expedited way, I would ask all witness to be very brief, if you would, please. I learned very early on in my judicial career that when you are ahead, the best thing to do is to keep it short and sit down.

I think all of these witnesses, by virtue of their qualifications, are certainly ahead by virtue of their being here today and so I would urge all the witnesses to be brief in their presentations.

Now, since we have Senators from two other States, Senator Feinstein being a member of the committee, I am going to ask her for the first nomination and then we will see what other members come forward at that time. Senator Dianne Feinstein. Senator Boxer, please take one of those chairs. Thank you.

Senator Feinstein.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR
FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Senator Kyl and Senator DeWine, Senator Feingold. I want to begin by thanking Chairman Hatch for scheduling these hearings. I am very appreciative, and I am honored and delighted to recommend to the committee three district judges and one Federal appellate court nominee from

my home State, California.

I thank you.

In addition to Chuck Breyer and Frank Damrell, Senator Kyl, there are two other candidates, and I know my colleague will particularly speak on one. However, I do want to recommend to the

committee Judge James Ware, the administration's nominee for the Ninth Circuit Court of Appeals. I am delighted that this is calendared. As you know, over one-third of that bench is vacant. Its cases have grown dramatically and there are real problems.

He is a fellow Stanford alumnus. He went to Stanford Law School in 1972. He served as a member of the Stanford Board of Trustees. He attended Compton College, earned his B.A. degree from California Lutheran University in 1969, and has served in the Army Reserve.

He has been a State and Federal judge. In 1990, he was appointed by President George Bush to the U.S. District Court for the

Northern District, a position which he currently holds. Prior to that, he served for 2 years on the Superior Court for Santa Clara County. Before his judicial appointment, Judge Ware had 15 years of experience in private practice, including significant in-court experience.

Senator KYL. Thank you very much, Senator Feinstein.

Might I ask these three people who have been mentioned right now to stand? And finally, Judge James Ware. Judge, we will call you forward as the next panel, all by yourself.

Senator BOXER. Thank you so much. I also want to add my words on behalf of Judge Ware. I think it is really crucial we move on that ninth circuit. We have a third of those seats that are vacant. This is a great choice.

I hope that this process will, as I said, enable us to conclude this hearing today. I apologize for not having each of the people who were introduced at the table when the introductions were being made, but I think this will expedite the process.

Let me now call James J. Ware, Judge Ware of California, to come forward and be the first panel. He is nominated for the U.S. Circuit Court, the ninth circuit. Mr. Ware, will you please stand and be sworn first?

Do you swear that the testimony you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge WARE. I do.

Senator KYL. Thank you. Please be seated.

Judge, if you would like to make any kind of a statement, you are welcome to do that. Otherwise, the committee will begin its questioning. I see that my colleague has departed, so it may be me asking you the questions, but you are welcome to make a statement if you would like, and I would also like you when you are done to introduce the members of your family who might be here or anyone else you would like to introduce.

TESTIMONY OF JAMES S. WARE, OF CALIFORNIA, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Judge WARE. Thank you, Mr. Chairman. I do not have a prepared statement, but I would wish to take this opportunity to acknowledge the absence of my wife, Susan, who would very much wish to be here, and my son, Jeremy. They are home in Mountain View, CA. But I am fortunate that my daughter, Carlie, who is a sophomore at Yale, was able to fly down from New Haven to be

with me here today.

Senator KYL. Welcome to the committee.

Judge WARE. I also would wish to acknowledge the presence of Jan White, who is a local attorney here in Washington, a classmate of mine from Stanford. We just had our reunion at Stanford and she came, as well, to be supportive.

QUESTIONING BY SENATOR KYL

Senator KYL. Thank you for coming. We appreciate the attendance of all of the people in the audience, friends and family alike.

Judge, you come highly recommended. You have had some wonderful statements said about you and it is the intention of the committee, and I know I speak for the chairman in indicating it is our intention to try to fill these positions. The ninth circuit is the circuit of my State, as well, and we understand how important it is

to fill these positions, so you certainly have our commitment to try to move this along as quickly as possible.

Let me ask you a couple of questions. If other members arrive, then, of course I will call upon them to do so.

In a recent article, you criticize the operation of mandatory minimum sentences as inconsistent with the sentencing guidelines

scheme. Specifically, you wrote, and I am quoting now, "The judicial branch, charged with imposing a sentence according to law, is

empowered to exercise its discretion to modify rigid rules if warranted by circumstances in a particular case." That was in the article, "A Clash of Sentencing Policies: Sentencing Guidelines Versus Mandatory Minimums."

Do you believe that if the sentencing guidelines would prescribe a sentence below a mandatory minimum sentence, that you could ignore the statutory minimum?

Judge WARE. No, Senator. I should say, it was not a recent article. It was an article written very soon after the guidelines had

been passed. It had an invitation to write a piece for a meeting of the State Bar of California at one of the annual meetings. There was going to be a discussion of the sentencing guidelines and I was asked to write a piece to be submitted to provoke a discussion about the guidelines and how the policies of the guidelines compared with those of mandatory minimums.

Senator KYL. I appreciate the correction for the record. Could you give us a rough time frame of when that was written, then?

Judge WARE. I believe it was around 1990. The guidelines came into effect in the mid-1980's and this was an article that was submitted in approximately 1990.

Senator KYL. Could you explain, then, your view of what a judge should do when the guidelines and the mandatory minimums clash?

Judge WARE. Well, there is no clash, quite frankly. The mandatory minimum sentence, if it is required by law, is the one that a

court must impose. I would follow, and I have followed, the law in that respect in the sentences that have been handed down by me during my tenure as a district judge.

Senator KYL. And I gather it would be your intention to continue to do so?

Judge WARE. Yes, sir.

Senator KYL. In the absence of controlling precedent, how would you characterize your approach to interpreting the Constitution?

Judge WARE. Well, in the absence of precedents, I presume that I would be involved in applying the Constitution to a statute of some sort. It is my belief that statutes passed by Congress should

be presumed constitutional. If there are no cases upon which I could rely construing that statute, I would do my best to find as closely analogous a situation that would apply to the case. And in any event, I would attempt to try to decide the case as I believe the Supreme Court would decide it if the case were before it.

Senator KYL. For those who are not schooled in the law, that is kind of a quick question, properly answered, because, of course, in every case the lawyers argue that there is some precedent of some kind or some statutory or other reference to which the judge can make for a decision, and I appreciate that answer.

Can you think of cases that you think were-and I am talking now in the area of constitutional law-where strictly as a matter of first impression, do you think the U.S. Supreme Court improperly departed from the text or the meaning or history of the U.S.

Constitution?

Judge WARE. Well, it is difficult to think of a recent case. In our history, I would bring to mind the case of Plessy v. Ferguson, which is a case where the U.S. Supreme Court endorsed the separate but equal doctrine. Quite frankly, I believe that the Supreme Court, in making that decision, was attempting, in its own view, to interpret the constitution. But since that case and over time, we have come to a position where the Supreme Court has indicated that separate but equal is inherently unequal. That is now the law of the land and that is the law which I apply.

Senator KYL. And, of course, as a member of the circuit court of appeals, it is your obligation to apply the law as interpreted by the Supreme Court.

Let me ask you a question about an issue that is becoming important in recent years and ask you to set forth your views on

whether, when there is no evidence of past acts of employment discrimination directed at either identifiable individuals or any particular minority groups, and no evidence that members of a particular minority group are underrepresented in an employer's work

force, whether an employee may, under the Equal Protection Clause of the 14th amendment or title VII of the 1964 Civil Rights Act, use race, national origin, or gender as the basis for employment decisions.

Judge WARE. You said whether an employee may. I presume you meant employer.

Senator KYL. I misspoke. Employer, you are right.

Judge WARE. The case that I would bring to mind in response to your question is the Adarand decision of the U.S. Supreme Court, which, to my understanding, holds that in the absence of past acts of discrimination, race may not be used, that it is a suspect classification and that it is subject to strict scrutiny, the highest constitutional standard available, and it must be measured against whether there is a compelling governmental interest. But in the absence of a case of past discrimination, where race is being used to remedy that, that race may not be used as a basis.

Senator KYL. And that is the standard that you would apply?

Judge WARE. That is the standard I would apply.

Senator KYL. There being no other Senators here, I will ignore the red light and proceed. But what I would like to do is, instead of asking you all the questions which have been prepared by members and staff of various members, perhaps ask one more, since

Senator Kohl is now here, and then submit a couple of questions for the record for you to answer. Let me just ask you one more

question, and then if Senator Kohl has questions, I will call upon him.

Please state your best independent legal judgment, irrespective of existing U.S. precedent on the constitutionality of capital punishment.

Judge WARE. Capital punishment is constitutional, Mr. Chairman, and that is the law as enunciated to us by the Supreme Court

and I have no personal or philosophical beliefs that would in any way interfere with my applying capital punishment. I would not rejoice at the prospect, but in a proper case, I would not hesitate to oblige.

Senator KYL. Thank you very much.

Senator Kohl, do you have questions for the witness?

Senator KOHL. No.

Senator KYL. There are, as I said, a variety of other questions, but frankly, based upon the answers to the questions that you have provided thus far, all of which exhibit a very sound understanding of the law as I understand it and a desire to apply the law as enunciated by the Supreme Court, which is the duty of a member of the

circuit court, I would prefer simply to submit these other questions for the record. They are not unlike the questions that I have just been asking and that way we can move on, to some of these other nominees.

I want to tell the people in the audience-

Judge WARE. Thank you very much.

Senator KYL. If I could, while you are just seated here. The effort here, and you have heard reference to it by a couple of the Senators, to urge the Senate to hurry up and get some nominees approved, confirmed, so that these individuals can take their position on the bench, is well taken and our effort here today is to try to expedite that process.

I fear that our effort could be misinterpreted as a lack of interest in each individual nominee and in rushing through, without adequately considering factors pertinent to their nomination or an unwillingness to listen to them and to hear them, I want to assure all of the people in the audience that that is absolutely not the case, that to the extent we proceed quickly through this hearing, it is because of the qualifications of the nominees, that they have satisfied the preliminary tests that the administration and that the Senate staff and that the members themselves have applied to the nominations and that the lack of questions is really a testament to their qualifications and to the probability that the committee will act quickly on the nomination.

So please do not take our failure to hold the witnesses here for 1 hour and subject them to a long line of excruciating questions here as a lack of interest but rather a confirmation of the significant qualifications that they bring, and certainly, Judge Ware, that

applies in your case.

Judge WARE. Thank you, Mr. Chairman.

Senator KYL. Senator Kohl, do you have anything else?

Senator KOHL. No.

Senator KYL. Thank you very much for your presence here and we will look forward to seeing you again.

ANNE WILLIAMS
TUESDAY, OCTOBER 26, 1999
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 3 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond, presiding.

Also present: Senators Abraham, Feinstein, and Torricelli.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S.

SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. The committee will come to-order.

I am pleased to hold the sixth judicial nomination hearing for this Congress.

I welcome the distinguished members of the Senate who are present to introduce particular nominees, and I am pleased that the nominees were able to be here today.

Judicial nomination hearings are among the, most important duties of this committee. A Federal judgeship is not only a position

of great power, it is also one of great responsibility to the people of this Nation and to the Constitution.

I wish to proceed in the following manner. After opening statements, I would like for the Senators who are present to introduce

their nominees. The Senators will constitute the first panel.

The second panel will consist of the nominees: Anne Claire Williams of Illinois for the Seventh Circuit Court of Appeals, Faith

Hochberg of New Jersey to be a district judge for the District of New Jersey; Frank McCarthy of Oklahoma to be a district judge for the Northern District of Oklahoma; and Virginia Phillipou of California to be a district judge for the Central District of California.

Before we start questioning the nominees, I will call on anyone to make an opening statement if they wish.

Senator FEINSTEIN. Why don't I let my colleagues go ahead with their statements, and then I will follow up at the end with my statement, if that is agreeable with you, Mr. Chairman.

Senator THURMOND. That would be fine.

I would like to express my support for the nomination of Anne Claire Williams for the U.S. Court of Appeals for the Seventh Circuit.

Judge Williams was appointed to the U.S. District Court for the Northern District of Illinois by President Reagan in 1985. Prior to that, she served for almost a decade as an assistant U.S. attorney for the Northern District of Illinois.

I have been assured by friends, with whom I have great confidence, that she is a very fine member of the Federal bench and

will perform admirably on the circuit court.

I also understand that she is a woman of high character and integrity. She is married and has two children. Although she lives in

Illinois, she has close ties to South Carolina. Her parents and her husband were born in South Carolina, and her father resides in the Greenville area today.

I am pleased to support her nomination and look forward to her continued service in this new capacity.

Yes, Senator Nickles.

STATEMENT OF HON. DON NICKLES, A U.S. SENATOR FROM

THE STATE OF OKLAHOMA

Senator NICKLES. Mr. Chairman, thank you very much, and, Senator Feinstein, thank you as well. I want to thank the committee for having the hearing today on a few nominees to be considered for district court judges and I guess one appellate judge.

Senator THURMOND Thank you. Senator Durbin.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you very much, Senator Thurmond, and my colleagues, Senator Feinstein and Senator Torricelli.

First, I would like to ask unanimous consent to enter into the record on behalf of Judge Anne Claire Williams' statement by Congressman Bobby Rush of Illinois. May I enter this in the record,

Mr. Chairman?

Senator THURMOND. Without objection.

Senator DURBIN. Thank you, Mr. Chairman.

Mr. Chairman, I noted for the record that you began this hearing with a very complimentary reference to Judge Williams who is seeking appointment to the U.S. Court of Appeals for the Seventh Circuit. Judge Williams told me before the hearing started that she considered it good luck that you were presiding because you presided over the hearing when she became a Federal district court

judge. So we are glad to see you here today and happy that you are joining and supporting her candidacy.

I might also note that my colleague, Senator Peter Fitzgerald, is here on behalf of Judge Williams, as evidence of the fact that she has strong bipartisan support not only at this table, but in our State of Illinois.

She was appointed to the Northern District of Illinois in April 1985 by President Ronald Reagan. At the time of her appointment, she was 35 years old. She was the youngest person ever appointed to the District bench in the Northern District and the first African-American woman jurist to have that opportunity to serve and she

has served well as a member of that District Court. In various committees, she has been recognized for her expertise. We believe she has the qualifications and experience necessary to make a tremendous contribution to the seventh circuit. She has worked as a prosecutor, a district court judge, a leader of the Judicial Conference, and in a variety of community activities.

I could go through her resume, but it is before you. I will not, only to tell you that it is extraordinary. I do note here that while she served on the District Court bench, she continues to teach and lecture at various law schools, including Harvard and Northwestern University. She is very active in community service. She

is the founder of the Just the Beginning Foundation, which honors African-American U.S. district court judges and raises funds for scholarships for minority law students.

She is joined today by her family, and I am sure you will have a chance to meet them when she comes to the table. I am sure her parents, Joshua and Dorothy Williams, from Detroit, MI, are very proud of their daughter today and the fact that she is being considered by this Senate Judiciary Committee.

Her husband, David Stewart, is here with their two children, Jonathan, a 17-year-old student at St. Ignatius High School in Chicago, and Claire, a 15-year-old student at the University of Chicago

Lab School, and finally, Judge Williams' sister, Drue Williams, is here today from New York.

Let me close by telling you, Mr. Chairman, we are often contacted by a variety of people who ask us to support different candidates for different positions. One of the most unique contacts came about 10 days ago when my wife and I went to Notre Dame University in South Bend, IN, to attend a football game with a team from California, and I will not go into details about the outcome, but I will tell you that as we approached the campus, we met the president of the university, Father Malloy, and he said to me, "Senator Durbin, have I ever lobbied you on anything?" I said, "No, Father, I do not believe you have." He said, "Well, I am about to. Do everything you can to help Anne Williams become a member of the Circuit bench in that district." They feel so strongly about her candidacy because she serves as secretary to the board of trustees at Notre Dame University, in addition to her many other activities, and that is why I am excited to be here today and support her candidacy.

Thank you, Mr. Chairman.

Senator THURMOND. My good friend, Senator Fitzgerald.

STATEMENT OF HON. PETER FITZGERALD, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator FITZGERALD. Thank you, Mr. Chairman and Senators Feinstein and Torricelli, and, Senator Durbin, I am pleased to join with you here in support of Judge Anne Williams.

I wonder if Judge Williams might be able to stand and be recognized. Thank you for being here with your family and your parents

from Detroit. We appreciate your being here.

Judge Williams, as Senator Durbin said, was appointed to the Federal bench by President Reagan back in 1985 at which time she was only 35 years old. She was one of the youngest Federal district court judges in the country, and she has had 15 years of serving with distinction in the Northern District of Illinois. In fact, going some years back, I remember appearing before Judge Williams as an attorney in a particular case. So I am pleased to be here today.

As Senator Durbin pointed out, she is a graduate of Notre Dame Law School. Her undergraduate degree is from Wayne State University. Judge Williams also holds a master's degree from the University of Michigan. She served ably as an assistant U.S. attorney in the Northern District of Illinois from 1976 to 1985. Prior to that time, Judge Williams was a clerk for Judge Robert A. Sprecher of the U.S. Court of Appeals for the Seventh Circuit.

I am pleased to stand here with Senator Durbin today. I would ask for unanimous consent that my full statement be submitted for the record.

Senator THURMOND. Without objection, so ordered.

Senator FITZGERALD. Thank you.

With that, I would like to thank the committee for its attention and also thank you for moving so quickly to fill the vacancy in the seventh circuit.

Senator THURMOND. Thank you.

I ask that each nominee come and stand at the witness table and raise your right hand, and I will administer the oath.

Raise your right hand. Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge WILLIAMS. I do.

Senator THURMOND. Have a seat.

If any of you have an opening statement or would like to introduce any family or friends who are with you here today,

please feel

free to do so at this time. We will start the hearing with Judge Williams and go down the line.

Judge WILLIAMS. Mr. Chairman, would you like me to proceed first, to introduce my family?

Senator THURMOND. Yes.

TESTIMONY OF HON. ANNE CLAIRE WILLIAMS, OF ILLINOIS,
TO BE U.S. CIRCUIT COURT JUDGE FOR THE SEVENTH CIRCUIT

Judge WILLIAMS. I am very pleased, Mr. Chairman.

Senator THURMOND. You can stand up, if you want to.

Judge WILLIAMS. All right. Thank you, Mr. Chairman. I am very pleased to have this hearing today and very honored, Mr. Chairman, because about 15 years ago you presided over my first confirmation hearing.

Senator THURMOND. I am glad to have you back.

Judge WILLIAMS. And I am happier to be back.

I have with me, and I am thrilled to have with me, my parents who were with me 15 years ago.

Senator THURMOND. Stand up.

Judge WILLIAMS. My father, Joshua Williams, who has been living in the Greenville area for the last 10 years, my mother, Dorothy Williams, who lives in Detroit my husband of 20 years, David

Stewart, who was born, in Columbia, SC, my two children, Jonathan Williams Stewart and Claire Elizabeth Williams Stewart, who

are much bigger, Mr. Chairman, than they were 15 years ago. Also here is my sister, Drue Williams, from New York, the father of my godchildren, Lyle Logan, and many friends and colleagues from the

Court Administration and Case Management Committee where I served as chair. In addition, Vincent Barnes is here who is on the

staff of Congressman Bobby Rush, my Congressman who unfortunately could not be here today due to the death of his son, and

other friends and supporters. The only member of my family who is not here is my sister, Marsha, from Detroit, who unfortunately could not attend.

Senator THURMOND. Well, tell her we missed her.

Judge WILLIAMS. I will do that, Mr. Chairman. Thank you.

Senator THURMOND. We are glad to have all of you.

Senator Abraham, would you like to make a statement?

STATEMENT OF HON. SPENCER ABRAHAM, A U.S. SENATOR
FROM THE STATE OF MICHIGAN

Senator ABRAHAM. I would, and I appreciate the chair's indulgence, and my colleagues. If I could just make a brief statement.

I have to be at another place at this point and cannot stay for the hearing, but I just wanted to come by and welcome Judge Williams

to our Senate Judiciary Committee today. As the Senator for Michigan, I am proud of the fact that she is a native of our State and

went to Wayne State University, I believe, and the University of Michigan Law School. I am not so happy that she then left Michigan and took her great skills and talent to another jurisdiction, but

I just wanted to come by because she has much strong support among a number of mutual friends in our State, and I just wanted to come by to wish her a warm welcome and wish her the best in this process and to welcome her family as well. We are very proud of her achievements.

Judge WILLIAMS. Thank you so much, Senator.

Senator THURMOND. We gave her a good start in South Carolina.

Senator ABRAHAM. Thank you.

Senator THURMOND. Thank you very much.

Senator ABRAHAM. Thank you.

Senator THURMOND. Thank you.

Judge Williams, in our tripartite system of government, the Congress under the Constitution makes the law. The President and chief executive enforces the law. The Judiciary interprets the law. Some judges seem to think they have the authority to make the law. What is your opinion of my interpretation of our system of government?

Judge WILLIAMS. I think, Mr. Chairman, your interpretation is absolutely accurate. The Constitution calls for three branches to perform the roles as you have described. The role of the judge is to look at the facts and the law presented in a particular case and to rule accordingly. It is not the role of the judiciary to make laws or create laws. That is the role of Congress, and so I agree with your analysis, Mr. Chairman.

Senator THURMOND. It makes me feel better that you agree.

Judge Williams, in *Lifters v. Hartigan* in 1990, you held that an Illinois statute prohibiting an experimental medical procedure was unconstitutionally vague and violated a woman's constitutional right to privacy regarding her right to terminate her pregnancy. Please explain to the committee your ruling in this case.

Judge WILLIAMS. All right. Mr. Chairman, it was a State law that prohibited fetal experimentation unless it was therapeutic to the fetus. What I did was look at Supreme Court precedent as well as circuit law to determine whether or not that statute was clear, whether a doctor who was asked to be involved in an experimental project would have sufficient guidance from the language of that statute.

I did as I always begin with any State statute or any Federal statute with the presumption that it was constitutional. Once I then looked at the language of the statute to determine whether the language was clear and whether someone who read the statute would understand it and what effect it would have, I looked at the statute and found that the language was ambiguous, and then in that opinion laid out various examples of why the statute was ambiguous.

I spent the first 14 pages or so dealing with that particular issue and then the last page of the opinion also talked about the right to privacy and the fact that it violated that from a constitutional standpoint as well.

I think if you have had an opportunity to look at that opinion, I went into great detail explaining the various ways that that law could be interpreted by doctors and felt that in order to be complete, I needed to reach that final issue. I also had anticipated that

this was the kind of case that might be appealed and wanted to be as complete as possible, and so that is why I offered an alternative grounds that was consistent with the law of the land.

As it turned out, that case was not appealed on substantive grounds. It was appealed for another reason, but the plaintiffs-the defendants in that case never appealed.

Senator THURMOND. Thank you.

Now, all of you answer this question. You

may start and go down the line. Do any of you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence?

Judge WILLIAMS. I do not, Mr. Chairman. The Supreme Court has spoken, and I do not have any reservation about imposing the death penalty.

Senator THURMOND. Thank you all very much.

Judge WILLIAMS. Thank you, Mr. Chairman.

Senator THURMOND. You answered the question well.

Senator Feinstein, we would call on you now for any questions.

QUESTIONING BY SENATOR FEINSTEIN

Senator FEINSTEIN. Thank you very much. Thanks, Mr. Chairman.

I would like to ask Judge Williams the first question, if I might.

You mentioned that you served as chair of the Court Administration and Case Management Committee of the Judicial Conference

of the United States. As I understand it, this body makes policy recommendations to the Judicial Conference concerning issues of court administration and case management for the Federal judiciary. I think one of the issues you worked on was the efficient movement of civil cases through the courts.

What findings, if any, did you make on how to expedite civil cases?

Judge WILLIAMS. Well, the Civil Justice Reform Act, which really grew out of this committee because it was an initiative of Senator Biden, caused the Federal courts to closely examine the procedures that were in place in all district courts and set out some principles that we should abide by in moving cases through the system in an expeditious manner.

As a result of that initiative, we gathered data on thousands of civil cases to try to determine what was an effective way to move cases. Judges had always felt--or many judges had felt that it was very important for a judge to get involved early on in managing a case, and that that was an effective technique. I think the Biden study showed support for that concept.

Another thing that judges felt was useful in helping to move cases was setting a firm trial date so that the litigants knew that cases were going to trial, they had a firm trial date, they would work toward that goal and would move it along.

As a result of that initiative, we examined various techniques, and now many district have adopted plans tracking cases, putting cases that are not as complex on a fast track, cases that are very complex on a longer track, but I think the bottom line is we recognize in the judiciary that judges cannot sit back and just let the

cases move along at their own pace. We have to have a plan that we work on with the lawyers, making sure that everyone has an adequate time for discovery, and making sure that the law is followed, but that kind of plan is necessary in order to move the cases along.

Senator FEINSTEIN. Thanks very much.

Under what circumstances, if any, do you believe an appellate judge should overturn precedent?

Judge WILLIAMS. Well, an appellate judge is bound, I think, by the oath that we take, just as I took an oath as a district court judge to follow the precedent of the Supreme Court, and that is what I would do if I were appointed to the court of appeals.

Senator FEINSTEIN. So are you saying that there are no circumstances?

Judge WILLIAMS. I think it would be an extremely rare circumstance where a circuit judge would enter an opinion to overturn a Supreme Court decision when that Supreme Court law was

there. I can't think of a circumstance, Senator Feinstein.

Senator FEINSTEIN. Thanks very much.

Thank you very much. I thank all of you very much.

Thank you, Senator.

Senator THURMOND. Senator.

QUESTIONING BY SENATOR TORRICELLI

Senator TORRICELLI. Thank you, Mr. Chairman, very much.

Let me first congratulate each of the President's nominees on their candid answers to the questions. I thought, Mr. Chairman, their endorsement of the death penalty, considering the views of some members of this committee, showed particularly a good judgment. The only advice I would have in the future to really get the

enthusiastic support of the committee would be to say that they not only support the death penalty, but believe generally it does not go far enough.

Senator FEINSTEIN. I hope that is humorous.

Senator TORRICELLI. It is.

If not, maybe I could ask a general question, then, of each of the nominees. There is this evolving new doctrine of the law of exactly what is the appropriate, standard on these redistricting cases. It was a strict one man-one vote based on the last census. That seems to have eased in recent cases. We had gone to enormous lengths at court mandate on racial and ethnic drawings of lines in which the court now clearly has an evolving notion as well.

As I suggested, very often these cases go and are decided and drawn at the district court level. Can any of you-if indeed you can give an accurate assessment of where this body of the law is, you would be the only four people in America-but nevertheless I think an appropriate question to get your feelings about where we are with it.

Judge WILLIAMS. Well, Senator, I have to say that I have not had a redistricting case presented to me.

Senator TORRICELLI. Which is only to your benefit.

Judge WILLIAMS. Right.

And if such a case were to be presented before me, of course, I would have to look to the precedence set by the Supreme Court, the law of our circuit, the facts that are presented, and to make those judgments. I can't give you an answer to that question because I don't know all the facts and I don't have the law before me.

Senator TORRICELLI. Let me just conclude, then, that you would find, as I suggested in my opening comments, that in this Senate on issues of punishment, the standard can never be high enough. Indeed, the death penalty itself largely is as close to a consensus issue as you can now develop, I think, in the political establishment in this country, but there is another side of this that is almost never raised and I will leave you with it, and that is, the people that you will sentence to incarceration, the standards by which

in this country we are now incarcerating people, the manner in which they live, the breeding of crime that we do in these institutions, sometimes the inhuman way in which people are kept, not

only to their individual detriment, but to the societies at large given the kind of individuals who are bred in these institutions.

You will in the course of your long tenure on the court also hear many cases and many complaints. This Congress, like most State

legislatures, does not often provide the resources to ensure that people who have done wrong, sometimes great wrongs, and should be incarcerated and sometimes for a long period of time, nevertheless retain at least some sense of the human dignity in their conditions, lest they become larger problems for society or lose their lives themselves. That is in your hands.

In our political system today, they will have no other defenders, no other advocates. There is no constituency in the country for them, and there are few in this Congress. Only you will stand before them.

I congratulate each of you. It is going to be an extraordinary experience in life, a wonderful opportunity to serve our country. Any

time in being involved in this process, I am always reminded that long after I leave the Senate, indeed most of us leave the Senate,

you will continue to impact public policy and the lives of Americans. You are extensions of each of our own careers for a long, long

time. Good luck to you.

Judge WILLIAMS. Thank you.

Senator THURMOND. I would ask that any follow-up questions from members be submitted to the committee by the end of Friday of this week.

Does anybody have any further questions?

Senator FEINSTEIN. No. Thank you very much, Mr. Chairman.

Senator THURMOND. Thank you.

I want to thank all of you. I congratulate you and wish you well.

If you come by, I would be glad to shake hands with you.

Judge WILLIAMS. All right, Mr. Chairman.

CHARLES WILSON
TUESDAY, JULY 13, 1999

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:19 p.m., in room SD-628, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Sessions, Leahy, and Schumer.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. I apologize for being late, and I know we have some Senators who are really pressure-packed-especially the Senator from Kansas.

Today we are holding hearings for five judicial nominees--one circuit court nominee and four district court nominees.

Now, the hearing follows the committee's approval of 10 nominees earlier this year. Together Senator Leahy and I have ensured

that this committee has taken a balanced and fair approach in administering the committee's role in performing its constitutional duties of advise and consent.

It is our responsibility to see that the President's nominees receive a fair hearing and that the Federal courts are adequately

staffed to perform their constitutional function. This committee has been instrumental in the Senate's confirmation of 311 of President

Clinton's judicial nominees and over 200 other nominees. By conducting thorough but expeditious reviews of nominees and by holding hearings, we should be able to keep the number of vacancies

from inhibiting the work of the Federal courts and other bodies. By working together we can conduct a fair and evenhanded process for evaluating and approving nominees, just as we have done in the past.

We have two panels today. The first panel consists of the sponsors of the nominees who will give brief statements on behalf of

their nominees. The second panel will consist of the nominees themselves.

When Senator Leahy arrives, we will give him adequate time to make any statement he would care to make, and I will be glad to turn to him at that time.

If we can, the distinguished Senator from Kansas, Senator Roberts, has to get to a markup, so I am going to turn to him first for

his nominee, and then we will go to the rest of the Senators who are here.

Senator Graham, we will put you on next, then Senator Gorton, then Senator Mack is here, then Senator Boxer, Senator Murray, Senator Brownback.

Senator Graham.

STATEMENT OF HON. BOB GRAHAM, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator GRAHAM. Mr. Chairman, thank you very much, and I appreciate the opportunity to present two distinguished candidates

for the Federal judiciary, and I want to say how much I appreciate the courtesy that you have extended for the several Florida nominees that have been before your committee in recent months.

It is a tremendous privilege to introduce Charles Wilson and

Adalberto Jordan for your consideration as the two newest Federal judges from Florida. Mr. Wilson has been nominated to succeed the retiring judge Joseph Hatchett in the Eleventh Circuit Court of Appeals. Mr. Jordan has been selected for an open judgeship in Florida's Southern Judicial District.

Before I commence-and I would like to ask, Mr. Chairman, if I could file my full statement.

Chairman HATCH. Without objection, we will take all the statements.

Senator GRAHAM. And I will, in deference to your busy schedule, summarize it.

I want to thank my colleague and good friend, Senator Mack, for his tireless efforts on behalf of Florida's Federal judicial nominees.

He was unable to be here today but asked that a statement of-

Chairman HATCH. He is right behind you.

Senator GRAHAM. Oh.

Chairman HATCH. I think what we will do, we will have Senator Mack right after you so that we can do each judge in a row.

Senator GRAHAM. I had actually even more flattering statements

about Senator Mack, but he will have to read those in the statement that will be submitted for the record.

Mr. Chairman, again, Senator Mack and I appreciate your attention to Florida's needs in the midst of what has been described as

a Federal judicial crisis. But for the fact that this committee has been so attentive when vacancies occurred, that crisis would be even deeper. And I thank you for your commitment to addressing these special challenges.

Charles Wilson and Bert Jordan are the latest in a long line of outstanding judicial nominees who have been before this committee. During their long legal careers, they have demonstrated

mastery of the law, personal dedication to the betterment of the legal community, and an abiding commitment to public service.

This combination of qualities has prepared them well for the service that they will soon render with the consent of this committee

and the Senate on the Federal bench.

It is entirely appropriate that Charles Wilson succeed Judge Hatchett as the appellate judge in the Eleventh Judicial Circuit.

Mr. Wilson's legal career began at the distinguished jurist's side when he served as Judge Hatchett's clerk in 1981. This was an auspicious and telling beginning.

In the nearly 2 decades since then, Chuck Wilson has established himself as one of Florida's most respected members of the legal community. He has practiced law from a variety of perspectives, including 5 years of private practice and service as an assistant county attorney in one of our largest counties, Hillsborough County. It

was my privilege in 1986 to appoint Mr. Wilson as a county judge in Florida's Thirteenth Judicial Circuit, which is based in Tampa.

By then Chuck Wilson's legal acumen had attracted attention from every corner of our legal community.

After 4 years as a county court judge, he was appointed U.S. magistrate judge in the Middle District of Florida, and in 1994, President Clinton nominated him and this committee approved him for an opening at the U.S. Attorney position in the Middle District of Florida. He has held that position since that time and has served with great distinction. He has done so in a district which is under unique pressures. It is a district which grew by 52 percent since 1980. It is a district which has had an exploding caseload. Chuck Wilson has met those challenges.

Mr. Chairman I would like to enter into the record an editorial on Mr. Wilson's behalf from the Tampa Tribune entitled "The Strong Case for Charles Wilson." Endorsing his nomination, the Tribune calls Mr. Wilson "a man of conviction whom we can trust to act fairly and wisely." I would ask that that be included

Chairman HATCH. Without objection, we will put it in the record.

Senator GRAHAM. Mr. Chairman, the theme of today's hearing on these two outstanding nominees could well be summed up as the Federal prosecutors' losses are the Federal courts' gains.

Mr. Chairman, I appreciate this opportunity to present these two outstanding nominees, and I urge your favorable and expedited attention.

Thank you.

Chairman HATCH. Thank you, Senator Graham.

Senator Mack, we will finish up with these two nominees, and then we will turn to Senator Gorton.

STATEMENT OF HON. CONNIE MACK, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator MACK. Thank you, Mr. Chairman and members of the committee. First of all, again, I want to thank you for your responsiveness to the needs of the State of Florida, and I want to extend

my appreciation and thanks not only to members of the committee but also to the staff as well. You have worked with us closely over the years, and we greatly appreciate that.

Chairman HATCH. Thank you.

Senator MACK. First, I would like to recommend Charles Wilson for confirmation to the position of circuit judge for the U.S. Court of Appeals for the Eleventh Circuit. Mr. Wilson is a well-respected attorney who has a varied and distinguished career in the Florida legal community. He is highly respected in the Middle District of Florida where he is currently serving as the U.S. attorney.

Mr. Wilson's legal career spans back to 1979. As a sole practitioner, he represented clients in both the civil and criminal arena.

Mr. Wilson spent time on the other side of the bench as both a county judge for the Thirteenth Judicial Circuit of Florida located in Hillsborough County and as U.S. Magistrate Judge for the Middle District of Florida.

It is evident that a considerable amount of Mr. Wilson's legal career has been spent in the courtroom, and as a result of this extensive experience, he is well prepared to handle the challenges of a Federal Circuit Court Judge.

It is my belief that this nominee is one that the Senate can be proud to confirm. I am confident that, if confirmed, Mr. Wilson will bring to the appellate bench an outstanding background which will serve to maintain the integrity of our legal system and provide justice for those who come before him.

Mr. Chairman, these two nominees are both excellent candidates with exemplary credentials. I urge this committee's and the Senate's swift confirmation of both Mr. Wilson and Mr. Jordan, and I thank you again.

Please enter my full statement into the record.

Chairman HATCH. Well, thank you, both of you Florida Senators.

That is high praise indeed for these two fine nominees. We look forward to having them testify in just a few minutes, but we will be

happy to release you so that you can go about your business. We know you are both busy,

Let's turn to the ranking member who would care to make a statement at this point.

Senator LEAHY. Mr. Chairman, I just want to thank you for holding this hearing. I know that another member of the committee was going to be here and was otherwise detained and that you filled in for him and I appreciate that. As you know, I have expressed some concern about where the schedule is. I was glad to see we were able to get some judges confirmed just before the break.

I will put my full statement in the record in the interest of time. We are happy to have all these Senators testify for the judgeship nominees here today, and I just wonder if each of the nominees will now stand and come up to the table. If you will all raise your right hands, I will swear you in. Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. WILSON. I do.

Chairman HATCH. Thank you. Please take your seats at the witness table, and we are very pleased to have all five of you here today.

Mr. Wilson.

TESTIMONY OF CHARLES P. WILSON, OF FLORIDA, TO BE U.S. DISTRICT CIRCUIT JUDGE FOR THE ELEVENTH CIRCUIT

Mr. WILSON. Senator, I am very pleased and privileged to be here today, and I would like to express my appreciation to both Senators Mack and Graham for their appearance here today and for their statements on my behalf. I am also pleased to have my wife here today. My two daughters, Courtney and Kendall, were unable to make it, but they are here in thought, and I appreciate the opportunity.

Chairman HATCH. We will have "The Hammer" be the representative of all the other children that can't be here. We are happy to

have all of you here. We think it is a tribute to each of you that you have the nomination of the President of the United States for our respective judgeships. It is a privilege to serve on the Federal bench, one of the highest privileges in this land, one of the few jobs that really are for life and literally have lifetime salaries, even when you retire. So we appreciate the qualifications of each of you.

Let me begin with you, Mr. Wilson. As U.S. Attorney and as a former Federal magistrate in Tampa, Florida, you have had to deal with some very difficult cases involving drug use and drug trafficking. In addition, you have had to deal with the civil forfeiture of assets used in the drug trade.

Now, in your view, what are the major legal concerns that arise from the civil forfeiture of assets?

Mr. WILSON. Well, the Middle District of Florida has really been one of the leaders in the country over the past 5 years in forfeiture of assets previously owned by criminals. The Department of Justice feels very strongly that forfeiture is one of the most important tools that we have in our arsenal to fight crime, not just because of the deterrent effects but because forfeiture deprives sophisticated criminal organizations of the wherewithal to operate.

I understand that there is legislation that is presently under consideration, the Civil Forfeiture Reform Act, and there is a proposed

amendment to that legislation by the Department of Justice. If I am selected to serve as a court of appeals judge, I will faithfully and scrupulously apply that law if it is enacted by the Congress.

Chairman HATCH. Thank you. In addressing cases that deal with

the proper role of the States and the National Government in our system of federalism, it is important for an appellate judge, a Federal appellate judge, to follow the text and the history of the Constitution as well as the precedents from our U.S. Supreme Court.

For example, Article I, Section 8 of the Constitution enumerates several limited powers of Congress, and the Tenth Amendment reserves powers not granted to the Federal Government to the States or to the people.

Now, in your view, what role do the States have in our constitutional system?

Mr. WILSON. Well, certainly, if I am selected to serve, I will be sensitive to concepts of comity and federalism and support those provisions of the Constitution that articulate the limited powers of the United States in conjunction with the powers of the State, and I will faithfully apply the precedents established by the U.S. Supreme Court which limit the powers of the United States in relation to the powers of the State.

Chairman HATCH. Will you faithfully apply those precedents, even if you disagree with the decisions of the Supreme Court?

Mr. WILSON. My personal opinions will have no bearing whatsoever on my role as a U.S. circuit judge.

Chairman HATCH. Thank you.

Let me ask a series of questions now of all of you that I think we need to ask. The Founding Fathers believed that the separation of powers in a Government was critical to protecting the liberty of the people. Thus, they separated the legislative, executive, and judicial branches of government into three different branches of government, the legislative power being the power to balance moral, economic, and political considerations and make law; the judicial power being the power only to interpret laws made by Congress and by the people. In your view, is it the proper role of a Federal judge when interpreting a statute or the Constitution to accept the balance struck by Congress or the people, or to rebalance the competing moral, economic and political considerations? I presume you agree with all that, Mr. Wilson?

Mr. WILSON. I agree, Senator. I am a strong proponent of our system of separation of powers.

Chairman HATCH. Let me ask you a separate question, Mr. Wilson.

under what circumstances do you believe it appropriate for a Federal court to declare a statute enacted by Congress unconstitutional?

Mr. WILSON. I think that every statute when it is enacted is afforded the presumption of constitutionality, so if I were selected to serve, that would be my role as a U.S. circuit judge, to afford statutes enacted by Congress with the presumption of constitutionality.

Chairman HATCH. At times, you all have stated that you would be bound by Supreme Court precedent and, where applicable, the rulings of the Federal Circuit Court of Appeals in your district. At

least that is the way I have interpreted what you have had to say.

Does anybody disagree with that?

Mr. WILSON. No, Senator.

Chairman HATCH. There may be times, however, when you will be faced with cases of first impression. What principles will guide you, or what methods will you employ in deciding cases of first impression?

Shall we start with you, Mr. Wilson?

Mr. WILSON. Well, if it is an issue of I think you first look to the Constitution of the United States and apply the plain meaning of the Constitution if it is a case involving the constitutionality of a particular statute or a law. From there, you would look to settled precedent rendered by the U.S. Supreme Court or to the law of your circuit or to the other circuits within the Federal system. So

I believe in the concept of stare decisis; you look to the Constitution and then established Supreme Court precedent, settled Supreme Court precedent, and then to the law of your circuit, and in the absence of circuit authority, to the circuit authority of the various other circuits.

Chairman HATCH. Mr. Wilson, let me ask you one other question.

Please state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness under the

Equal Protection Clause of the Fourteenth Amendment and Federal civil rights laws of the use of race, gender, and national origin-based preferences in such areas as employment decisions-that would be hiring, promotions, or layoffs-college admissions and scholarship awards, and the awarding of government contracts.

Mr. WILSON. I believe the Supreme Court has spoken on that issue in the Adarand case, and if I am selected to serve, I will strictly apply that decision on the Eleventh Circuit. I believe that the Supreme Court has ruled in that case that affirmative action plans with respect to governmental entities are subject to a strict scrutiny analysis which is a very high analysis. The court is required under those circumstances to ensure that the affirmative action plan is narrowly tailored to further a compelling governmental interest, and I will follow that precedent faithfully.

Chairman HATCH. Thank you.

Do you have any legal or moral beliefs which would inhibit you or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a Federal judge?

Mr. WILSON. No, Mr. Chairman.

Chairman HATCH. Do you believe that 10-, 15-, or even 20-year delays between the conviction of a capital offender and execution is too long?

Mr. WILSON. I would agree. It is a well-worn expression, but justice delayed is justice denied, and I think public confidence in our judicial system is furthered by expeditiously resolving this issue as quickly as possible.

Chairman HATCH. The Senator from New York has been very, very kind to let me go through some of these questions; I thought we needed to do that. But I will turn to you, Senator Schumer.

Senator SCHUMER. I thank you, Senator.

I just want to congratulate the witnesses and their families on this momentous day for all of you. I look forward to hearing the debate on the floor of the House and voting on your nominations. I do not have any questions. I think we have a fine group of nominees.

Senator SCHUMER. I thank you, Mr. Chairman.

Chairman HATCH. Thank you.

I want to thank all of you. We have done a lot of examination of each of you before you got here, so I know an awful lot about each of you, and I am very proud to be able to support each of you for these respective positions.

I would just encourage you to really live up to what you have said here today. I will give you an illustration. This committee is having a whale of a difficult time-let me just single out one circuit court of appeals, the Ninth Circuit Court of Appeals-getting anybody approved for that circuit, which is short a considerable number of judges, because there are a number of people on that circuit court of appeals who disregard what the law says; they just substitute their own ideas for what the law ought to be in

their eyes.

In the process, they have really hurt liberal judges all across this country.

I have had a number of excellent liberal judges come to me and say, "It is a disgrace what they are doing, because they are hurting all of us; they make us all look bad."

You have all said today that judges are suppose to interpret the laws, not make them. You are not elected to anything. You are nominated by the President, and I believe you will be confirmed by this committee and the Senate before the end of this year, and hopefully before the end of this month, and you are nominated and confirmed for life. You do not have to stand for reelection. Senator Schumer and I do have to stand for reelection, and if people do not like the laws we pass, they can throw us out of office.

Senator SCHUMER. Although I would say, Mr. Chairman, I like the 6-year term much better than the 2-year term we had in the House.

Chairman HATCH. That is why you went through all that pain up there in New York. I feel sorry for the First Lady, to be honest with you.

But you can do judging a great favor by recognizing the role of judges. Naturally, you are going to have cases of first impression where you are going to have to decide them. You may be right and you may be wrong in deciding, depending upon the appellate courts above you, district judges, and the Supreme Court above you, Mr. Wilson. But the fact of the matter is that you really hurt everybody if you do not abide by the rule of judging. And it is something that I am fairly strong about, because we do have an excellent Federal judiciary. I think it is the branch of government that has done more to preserve the Constitution and save this country than any other branch. And I sit in the legislative branch, and in many ways, I think it is the most powerful branch because we have the power of the purse, but you have the power of determining whether we are going to live by rule of law, which many countries do not live by. So it is very important that you set an example and that you do what is right even if you disagree with the courts above you. Unless there is some legitimate reason for disagreeing that is more than judicial activism, it seems to me you have got to apply the law as it is written and observe the rule of judging and acknowledge that there are obligations and duties of the other two branches of government that are separate from yours and just as important as yours. I commend all of you.

I had not noticed Senator Sessions here until now. Senator, do you have any questions?

QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. Just briefly, Mr. Chairman. I want to second your comment that we do review the nominees and their backgrounds carefully; that has been done by my staff and the committee staff. You bring much to commend each of you. I hope that I will be able to support each of you.

I do take this advise and consent responsibility seriously. This is the only time the people have any opportunity to say on your nomination other than the fact that you have been nominated, and you have a lifetime appointment, which is a rather august, serious event for us to look at.

I thought I would ask a few questions.

Chairman HATCH. Thank you, Senator Sessions.

I want all of you to know how proud we are of you and how proud I will be to support each and every one of you. The record will remain open for follow-up questions until the close of business Thursday, July 15.

I want to thank all of your family members for being here and others who are your friends and supporters. It is wonderful to see you all and to see what good families you have. Knowing what I know about your backgrounds, I am very, very impressed.

So we are happy to have all of you here, and we will be happy to try to get you up before the Judiciary Committee as soon as we can and hopefully report you to the floor as soon as we possibly can.

With that, we will recess until further notice.